Supreme Court, U.S.
FILED
MAR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1481

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

OEN YIN-CHOY,
Petitioner,

VS.

GLEN S. ROBINSON,
United States Marshal
for the Northern District of California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CEDRIC C. CHAO
Counsel of Record
MICHAEL M. CARLSON
JENNY D. SMITH
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
(415) 434-7000

Counsel for Petitioner
Oen Yin-choy

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Does the Extradition Treaty between the United States and the United Kingdom preclude extradition of an accused from the United States to Hong Kong when, as a result of the reversion of Hong Kong to Chinese rule on July 1, 1997, the accused will be surrendered by the United Kingdom to China, a country with which the United States has no extradition treaty?

2. Does the Due Process Clause of the Fifth Amendment require that an accused in an extradition proceeding be provided the original signed written statements of non-English speaking witnesses to permit the accused to challenge the accuracy of the foreign government's English translations of the witnesses' statements?

3. Does the Due Process Clause of the Fifth Amendment require that the accused in an extradition proceeding be permitted to cross-examine a key witness of the foreign government when that witness is present at the extradition hearing?

4. What is the proper interpretation of 18 U.S.C. § 3190, which provides that a United States consular officer may certify the authenticity of evidence to be presented in an extradition proceeding: (a) the interpretation of the court below that § 3190 precludes the extradition court from considering any objections to evidence so certified, or (b) the conflicting and contrary interpretation of the First Circuit in *Greci v. Birknes*, 527 F.2d 956 (1st Cir. 1976), which has been followed in practice by numerous federal district courts?

5. What is the proper interpretation of whether 28 U.S.C. § 455(a) requires a district judge who has issued an extradition order to disqualify himself from hearing a petition for habeas corpus filed to review that order: (a) the interpretation of the court below that recusal is not required, or (b) the conflicting and contrary interpretation compelled by the reasoning of the Fourth Circuit in *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978)?

6. Does the Ninth Circuit's decision here regarding the type of evidence an accused may present in extradition proceedings conflict with the holding of this Court in *Collins v. Loisel*, 259 U.S. 309 (1922)?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND TREATY ISSUES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
ARGUMENT	6
I. CERTIORARI SHOULD BE GRANTED BECAUSE HONG KONG'S EXTRADITION REQUEST VIOLATES THE U.S.-U.K. TREATY	6
A. Hong Kong Cannot Satisfy the Treaty Requirement that Mr. Oen Not Be Extradited to a Third Country	7
B. Hong Kong Cannot Satisfy the Treaty Requirement that Mr. Oen Not Be Prosecuted for Additional Offenses	8
II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE RIGHT OF THE ACCUSED TO CHALLENGE THE ACCURACY AND RELIABILITY OF TRANSLATED WRITTEN TESTIMONY	11
III. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE RIGHT OF THE ACCUSED TO CROSS-EXAMINE WITNESSES PRESENT AT THE EXTRADITION HEARING	14
IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A DISTRICT COURT HEARING AN EXTRADITION REQUEST MAY EXCLUDE INCOMPETENT EVIDENCE	17

TABLE OF CONTENTS

Page

V. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A DISTRICT COURT JUDGE MAY HEAR A HABEAS CORPUS PETITION CHALLENGING THAT JUDGE'S CERTIFICATION OF EXTRADITABILITY 21

VI. CERTIORARI SHOULD BE GRANTED TO CLARIFY WHAT EVIDENCE AN ACCUSED MAY PRESENT IN OPPOSING HIS EXTRADITION 23

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Page

Berenyi v. Immigration Director, 385 U.S. 630 (1967) 13

Bingham v. Bradley, 241 U.S. 511 (1916) 15, 16

Buckley v. Valeo, 424 U.S. 1 (1976) 20

Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980) 16

Charlton v. Kelly, 229 U.S. 447 (1913) 24, 26

Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973) 26

Collins v. Loisel, 259 U.S. 309 (1922) 18, 23, 24

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 20

Coy v. Iowa, ____ U.S. ____, 108 S. Ct. 2798 (1988) ... 15

David v. Attorney General, 699 F.2d 411 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983).....21, 23

Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).....21, 23

Escobedo v. United States, 623 F.2d 1098 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980)..... 13

Fay v. Noia, 372 U.S. 391 (1963) 22

Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977) 24

Greci v. Birknes, 527 F.2d 956 (1st Cir. 1976) 17, 18

Grin v. Shine, 187 U.S. 181 (1902) 15, 16

In re Artukovic, 628 F. Supp. 1370 (C.D. Cal. 1986) 13

In re Assarsson, 635 F.2d 1237 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981) 18

In re D'Amico, 185 F. Supp. 925 (S.D.N.Y. 1960), *appeal dismissed*, 286 F.2d 320 (2d Cir.), *cert. denied*, 366 U.S. 963 (1961) 24

In re Locatelli, 468 F. Supp. 568 (S.D.N.Y. 1979)..... 6

In re Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978) 18, 24

Kentucky v. Stincer, 482 U.S. ____, 107 S. Ct. 2658 (1987) 15

TABLE OF AUTHORITIES

CASES

	Page
Liljeberg v. Health Services Acquisition Corp., ____ U.S. ____, 108 S. Ct. 2194 (1988)	22
Marx & Co. v. Diners Club, Inc., 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977)	20
Messina v. United States, 728 F.2d 77 (2d Cir. 1984)	15
People v. Gutierrez, 137 Cal. App. 3d 542, 187 Cal. Rptr. 130 (1982)	13
Plaster v. United States, 720 F.2d 340 (4th Cir. 1983)	21
Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986)	8
Republic of France v. Moghadam, 617 F. Supp. 777 (N.D. Cal. 1985)	24
Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978)	21, 22, 23
Rosado v. Civiletti, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980)	16
Shapiro v. Ferrandina, 355 F. Supp. 563 (S.D.N.Y.), *modified and aff'd*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973)	22, 23, 24
Simmons v. Braun, 627 F.2d 635 (2d Cir. 1980)	15
United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959)	18, 19
United States v. Klein, 80 U.S. (13 Wall.) 128 (1872)	20
United States v. Najohn, 785 F.2d 1420 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986)	8
United States v. Security Indus. Bank, 459 U.S. 70 (1982)	21
Valentine v. United States, 299 U.S. 5 (1936)	5
Van Cauwenberghe v. Biard, ____ U.S. ____, 108 S. Ct. 1945 (1988)	5
Zanazanian v. United States, 729 F.2d 624 (9th Cir. 1984)	18

TABLE OF AUTHORITIES

Constitutions, Statutes and Rules

	Page
U.S. Constitution, Amendment V	2
18 U.S.C. § 3190	*passim*
28 U.S.C. § 47	22
§ 455(a)	2, 4, 21, 22
§ 1254(1)	1
§ 1291	1
§ 1331	1
§ 2241	1, 21, 25
§ 2253	1
§ 2255	23
Sup. Ct. R. 20.4	1
L.R. 501-1(c), S.D. Cal.	22
L.R. 32.1(a)(3), M.D. Ala.	22
L.R. 19.01(a)(1), D.S.C.	22
L.R. 13.01(a) 2, E.D. Wis.	22
L.M.R. 1.(a)(11), E.D. Wash.	22
L.M.R. 1(e), D. Mass.	22
L.M.R. 9, S.D.N.Y. and E.D.N.Y.	22

Treaties

Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1982, 28 U.S.T. 227, T.I.A.S. No. 8468	*passim*

TABLE OF AUTHORITIES

TREATIES

Page

Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of Great Britain and Northern Ireland, December 23, 1986 (132 Cong. Rec. S9120 (daily ed. July 16, 1986)) 10

Foreign Statutes

Hong Kong Theft Ordinance

§ 19(1)(a) 2

§ 21(1) 2

Other Authorities

Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441 (1988) 5, 6, 16

Note, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, IX B.C. Int'l & Comp. L. Rev. 293 (1986) 5

Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 34 (1983) 5, 6, 16

132 Cong. Rec. S9257 (daily ed. July 17, 1986) 8

5 Wigmore, *Wigmore on Evidence*

§ 1393 (Chadbourn Rev. 1974) 13

7 Wigmore, *Wigmore on Evidence*

§ 1953 (Chadbourn Rev. 1978) 20

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

OEN YIN-CHOY,
Petitioner,

VS.

GLEN S. ROBINSON,
United States Marshal
for the Northern District of California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Oen Yin-choy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on October 5, 1988. The Ninth Circuit affirmed the decision of the United States District Court for the Northern District of California denying Mr. Oen's petition for a writ of habeas corpus. That petition was filed to challenge the district court's Certification of Extraditability, which approved the extradition of Mr. Oen to Hong Kong.[1]

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 858 F.2d 1400, and is reprinted in the Appendix hereto. The relevant orders of the district court have not been reported and are also reproduced in the Appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Ninth Circuit's decision. This petition is timely filed following the Ninth Circuit's denial, on December 7, 1988, of Mr. Oen's petition for rehearing and its rejection of the suggestion for rehearing *en banc*. *See* Sup. Ct. R. 20.4. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, in that Mr. Oen's petition for a writ of habeas corpus was a civil action arising under 28 U.S.C. § 2241.

CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED

This suit involves application and interpretation of the Extradition Treaty Between the Government of the United States of

---

[1] All parties to Mr. Oen's action seeking a writ of habeas corpus are listed in the caption. The habeas action sought review of the earlier extradition proceedings which were initiated by the United States Attorney on behalf of the government of the United Kingdom and the Hong Kong Crown Colony.

America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468 (the "Treaty"). More specifically, this suit involves Article XII(1) of the Treaty, which prohibits the country requesting extradition from subsequently "extraditing" the accused to a third country, or from proceeding against the accused for offenses other than those which formed the basis of the original extradition request. This suit also involves the Hong Kong Theft Ordinance §§ 19(1)(a) and 21(1), the Due Process Clause of the Fifth Amendment to the United States Constitution, 18 U.S.C. § 3190, and 28 U.S.C. § 455(a). The relevant portions of each of these provisions are set forth in the Appendix.

STATEMENT OF THE CASE

The Hong Kong government is seeking to have Mr. Oen extradited from the United States to Hong Kong. Mr. Oen is a United States permanent resident with Indonesian citizenship. Until 1986 he was the majority shareholder and chairman of the board of Union Bank of Hong Kong. The Hong Kong government has charged Mr. Oen with six counts of "false accounting" in connection with five Union Bank loans and with one count of publishing a false statement in the bank's 1984 annual report.[2]

On March 6, 1987, at the request of the Hong Kong Crown Prosecutor, the United States Attorney for the Northern District of California filed a complaint for Mr. Oen's provisional arrest on the Hong Kong charges. On April 15, 1987, after Mr. Oen's arrest and release on bail, the United States Attorney filed the Hong Kong government's Request for Extradition (the "Request"),

---

[2] The Hong Kong government claims that the loans were false because their proceeds were not disbursed directly to the named borrowers and because the loan proceeds were disbursed in a complicated manner. The loan proceeds allegedly were used to repay a letter of credit issued by Union Bank to Borewell Trading Company Ltd. ("Borewell") and to repay depositors in Union Bank's offshore deposit, or Asian Currency Unit ("ACU"), accounts. The Hong Kong government claims the annual report was false because a footnote therein included these five loans among the bank's assets.

supported by written "affirmations" (*i.e.*, affidavits) submitted at that time.

Prior to the hearing on the Request, Mr. Oen challenged the district court's jurisdiction to order his extradition, arguing that Hong Kong had not satisfied and could not satisfy the prerequisites to extradition set forth in the Treaty. Because of the scheduled transfer of Hong Kong to China in July 1997, Hong Kong could not satisfy the Treaty's requirements that Mr. Oen not be extradited to a third country or tried for offenses other than those on which he was extradited.

Mr. Oen also moved to have the district court exclude ten of the Hong Kong government's affirmations. Those affirmations were written in English, but were signed by witnesses who neither spoke nor read English. Mr. Oen argued that the affirmations had not been properly sworn, as required by the Treaty, and that their admission would violate his due process rights. Alternatively, Mr. Oen moved for production of the original written signed Chinese-language witness statements that were the basis for the ten English-language affirmations. Mr. Oen argued that at a minimum, due process entitled him to challenge the accuracy of the Hong Kong government's translation of the witnesses' testimony.

Finally, Mr. Oen made more than 180 separate objections to the competence and admissibility of statements made in the affirmations submitted by the Hong Kong government.

The district court refused to consider any of Mr. Oen's objections to the Hong Kong government's evidence and denied Mr. Oen's motion for production of the Chinese-language witness statements. The district court also denied Mr. Oen's request to cross-examine the Hong Kong police officer who was present in court and whose written testimony formed the basis for the court's decision to admit the ten translated affirmations. The court also rejected Mr. Oen's argument that Hong Kong had not satisfied the prerequisites to extradition under the Treaty. On September 4, 1987, the district court filed a Certification of Extraditability.

There being no appeal from that Certification, Mr. Oen, on September 10, 1987, filed his petition for writ of habeas corpus.

Pursuant to the "related case" rule of the District Court for the Northern District of California, the habeas petition was reassigned from the judge originally designated to hear the habeas matter to the Honorable Robert H. Schnacke, who had decided the extradition request. Mr. Oen moved for disqualification of Judge Schnacke, pursuant to 28 U.S.C. § 455(a), since habeas was the only means to review Judge Schnacke's extradition rulings. On October 6, 1987, Judge Schnacke denied the motion for disqualification, and on November 13, 1987, he denied Mr. Oen's habeas petition.

Mr. Oen filed a timely appeal to the Court of Appeals for the Ninth Circuit. On October 5, 1988, the Ninth Circuit affirmed the district court's denial of Mr. Oen's habeas petition, and on December 7, 1988, denied Mr. Oen's petition for rehearing and rejected his suggestion for rehearing *en banc*. On December 12, 1988, the Ninth Circuit stayed extradition pending the filing and resolution of this petition for writ of certiorari. (App. P at A-56.)[3]

REASONS FOR GRANTING THE WRIT

This petition presents an important and unresolved question of federal law regarding the meaning and application of the Treaty between the United States and the United Kingdom. This issue—regarding the impact on the Treaty of the scheduled 1997 reversion of Hong Kong to the People's Republic of China—will arise in every extradition request made by Hong Kong between now and 1997. It has not been addressed by any appellate court other than the Ninth Circuit in this matter. Mr. Oen submits that the decision of the Ninth Circuit is in error, and that the unresolved question about the meaning of the Treaty is of such exceptional importance that it should be settled by this Court.

---

[3] All references to the Appendix to this petition are denominated "App.," followed by the unique letter assigned to each item. References to the Clerk's Record, United States District Court for the Northern District of California, are denominated by "CR," followed by the district court's docket control number assigned to the document in question and the page number within that document.

This petition also presents a number of important questions regarding the constitutional protections available to the accused, and the evidentiary and procedural rules to be applied, in extradition proceedings. Questions of this type have not been addressed by this Court for 53 years, since its decision in *Valentine v. United States*, 299 U.S. 5 (1936). The law now being applied by the lower federal courts has developed in the context of this Court's pre-1936 decisions. Both commentators and the United States Congress have suggested that the resulting U.S. extradition law is outdated and in need of reform. *See, e.g.*, Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441, 1441-43, 1491-93 (1988); Note, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, IX B.C. Int'l & Comp. L. Rev. 293, 293-95 (1986); *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 34 (1983) at 1, 31 (statement of Rep. Hughes), 34-35 (statement of Dep. Ass't Att'y Gen. Olsen), 194-95 (analysis by Prof. Bassiouni).

During the 53 years since *Valentine*, there have been far-reaching changes in both the procedural and the constitutional protections applicable to individuals accused of criminal acts. As a result of these changes, substantial tension now exists between the due process rights afforded to an accused who will be tried in this country and the rights that the lower federal courts—following this Court's pre-1936 decisions—afford an accused who will be extradited to another country to stand trial. *See* Kester, *supra*, 76 Geo. L.J. at 1442, 1444-46.[4] This tension has resulted in numerous conflicting decisions by the lower courts as they try to apply those older opinions in the context of modern

---

[4] Although extradition proceedings are often characterized as not strictly criminal in nature, the full "coercive power of the state" is brought to bear on a person sought for extradition, and his liberty is significantly restricted by pretrial detention, the need to post bail, and the potential that he will be removed to a foreign state to stand trial on the criminal charges. Kester, *supra*, 76 Geo. L.J. at 1445-47; *cf. Van Cauwenberghe v. Biard*, ____ U.S. ____, 108 S. Ct. 1945, 1951 (1988).

procedural protections. Several such conflicts are presented by this petition.

The past 53 years also have seen a dramatic increase in the number of extradition requests processed by the United States, with even greater increases expected in the future. *See 1983 Hearings on H.R. 2643* at 34, 42-44 (testimony of Dep. Ass't Att'y Gen. Olsen); Kester, *supra*, 76 Geo. L.J. at 1443. This growth in the importance of international extradition makes it essential that this Court resolve the conflicting lower court decisions and clarify extradition law as sought by this petition.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE HONG KONG'S EXTRADITION REQUEST VIOLATES THE U.S.-U.K. TREATY

Extradition requests made to the United States by Hong Kong are presently governed by the Treaty. (App. A at A-1.) The United States courts only have jurisdiction to order extradition of a person to Hong Kong pursuant to the terms and conditions of that Treaty. *See In re Locatelli*, 468 F. Supp. 568, 570 (S.D.N.Y. 1979). *See also* Treaty, Art. I.

Because of the United Kingdom's plan to surrender sovereignty over Hong Kong to China in 1997, Hong Kong cannot satisfy two of its obligations under the Treaty: the requirement that an extradited individual not be extradited to a third country and the requirement that an extradited individual be tried only on the charges for which he is extradited. The district court should have denied extradition because of Hong Kong's failure to satisfy these conditions. Although the district court erroneously granted extradition, it did recognize Mr. Oen's arguments as raising significant issues of first impression: "I suspect we have a matter that the [appellate] courts are going to want to look at." (CR 12 at 1589.) Indeed, these important questions of international law will arise in every extradition request by the Hong Kong government for the next eight years. For that reason, certiorari should be granted.

A. Hong Kong Cannot Satisfy the Treaty Requirement that Mr. Oen Not Be Extradited to a Third Country

The first precondition to extradition that was not satisfied here is found in Article XII(1) of the Treaty, which provides:

> A person extradited *shall not be detained or proceeded against* in the territory of the requesting Party *for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted*, or on account of any other matters, *nor be extradited by that Party to a third State*—
>
> (a) until after he has returned to the territory of the requested Party; or
>
> (b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

(Emphasis added.) (App. A at A-2-A-3.) Thus, Hong Kong is prohibited from surrendering Mr. Oen to a "third State" until "after he has returned to the territory of the requested Party [the United States]" or until thirty days after he is given the freedom to return to the United States. Extradition cannot be granted unless the country requesting extradition guarantees this protection to the accused.

Mr. Oen is accused of crimes carrying a maximum cumulative sentence of 49 years. (*See* App. D at A-8; CR 13 at Conyngham Aff. ¶¶ 15-16.)[5] If extradited and convicted, Mr. Oen could be incarcerated in Hong Kong through July 1, 1997, when sovereignty over Hong Kong passes to China. (App. T at A-77-A-78.) As a result of the United Kingdom's surrender of Hong Kong, Mr. Oen, in effect, will have been extradited to a third state, China, in violation of Article XII(1). The Hong Kong government has refused to guarantee that this will not happen. Therefore, the Hong Kong government did not satisfy Article XII(1) of

---

[5] Each crime charged in the seven-count complaint has a potential sentence of seven years' imprisonment. (App. D at A-8; CR 13 at Conyngham Aff. ¶¶ 15-16.)

the Treaty, and the district court lacked jurisdiction to issue a certification of extraditability.

The Ninth Circuit held there was no violation of Article XII(1), because the surrender of Mr. Oen to China in 1997 would not be an "extradition." (App. F at A-13.) Under the Ninth Circuit's reasoning, the Treaty prohibits Hong Kong from formally extraditing Mr. Oen and others in his situation to third countries, yet permits an informal "surrender" of such persons. The Ninth Circuit's formalistic distinction between "extradition" and "surrender" renders meaningless the undertakings set forth in Article XII(1), and ignores the overriding intent of the United States that persons extradited from this country not be transferred to nations having systems of justice far different from ours.[6]

B. Hong Kong Cannot Satisfy the Treaty Requirement that Mr. Oen Not Be Prosecuted for Additional Offenses

The pending transfer of Hong Kong to China also precludes satisfaction of the doctrine of "specialty." That doctrine prohibits the country requesting extradition from prosecuting the accused—once extradited—for any offense other than that for which the surrendering country agreed to extradite him. *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986). This principle of international law is codified in Article XII of the Treaty, which prohibits detention, trial, or prosecution for any offenses other than those which form the basis for the extradition order. *Quinn*, 783 F.2d at 783. (*See also* App. A at A-2.) Specialty is based on comity, and requires that the requesting state "live up to whatever promises it made in order to obtain extradition." *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986). The

---

[6] During the Congressional debates concerning the Supplementary U.S.-U.K. Extradition Treaty of 1986, Senator John Kerry expressed the Senate Foreign Relations Committee's intent: "[The United States] will not extradite a fugitive to a system of justice unacceptable to us," *i.e.*, a nation that does not "respect these fundamental individual safeguards" of "human rights and civil liberties." 132 Cong. Rec. S9257 (daily ed. July 17, 1986).

person facing extradition is entitled to raise objections based on the doctrine of specialty. *Id.*

The undisputed evidence presented below by Professor Chiu, an expert on Chinese law, established that the unique features of Chinese law and the ambiguities in Hong Kong's transition to Chinese control will allow the Chinese government to assert jurisdiction over crimes that occurred in Hong Kong before 1997. (App. T at A-82.) Even if Mr. Oen is tried in Hong Kong before 1997, Chinese law and practice would permit his retrial and resentencing after 1997.[7] (*Id.* at A-83-A-84.) This is significant because the Chinese criminal justice system rejects the Western principle of *nulla poena sine lege* (no punishment without a pre-existing prohibitory rule). (*Id.* at A-89.) Chinese criminal law also is drafted in general terms (*id.* at A-88) and contains a provision that where no crime specifically covers a given act, a person may be punished according to the most closely analogous existing statute. (*Id.* at A-89.) Thus, if Mr. Oen is extradited, convicted, and subsequently passed into Chinese custody, he will be subject to retrial under Chinese law for offenses other than those for which he has been extradited. Since Hong Kong cannot guarantee that China will not prosecute him for additional offenses, his extradition would violate Article XII(1) of the Treaty and the doctrine of specialty.

The Ninth Circuit found no Treaty violation, stating that the Treaty is binding only upon the United Kingdom and Hong Kong, but not upon third states. (App. F at A-14.) Yet, the fact that China is not bound by the Treaty's commitments is *precisely* why Hong Kong's refusal to guarantee that Mr. Oen will not be transferred to China constitutes a fundamental violation of the Treaty. The Ninth Circuit states that under Mr. Oen's treaty interpretation, extradition to Hong Kong "would be the exception rather than the rule." (*Id.*) The Ninth Circuit ignores the

---

[7] Chinese criminal procedure does not prescribe any time limit on the reopening of a previously decided case. (App. T at A-83.) There is no barrier under Chinese law to the *ex post facto* application of Chinese law and procedure to acts committed in Hong Kong prior to 1997. (*Id.* at A-84-A-85.)

judiciary's fundamental responsibility to uphold the law as it is written. If the executive branch is uncomfortable with the terms of the existing Treaty, then it can negotiate with the United Kingdom a modification to the Treaty, subject to Senate review and approval, that resolves the troubling issue of the status of extradited U.S. prisoners when Hong Kong reverts to China. Until such renegotiation takes place, however, the rule of specialty is U.S. law and should have been applied to bar extradition here.

During the debates concerning the Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, ratified and entered into force December 23, 1986 (132 Cong. Rec. S9120 (daily ed. July 16, 1986)), the Senate Foreign Relations Committee found "particularly disturbing" the executive branch's contention that Northern Ireland's judicial system was fair. 132 Cong. Rec. S9257 (July 17, 1986). If the Senate found controversial the notion of extraditing alleged IRA terrorists to a country under British rule, it is inconceivable that the Senate would intend that a 70-year old man in ill health, accused of accounting offenses, can be surrendered to China, whose criminal justice system is radically different from ours and has never been examined by our Senate.[8]

Finally, the Ninth Circuit mistakenly assumed that the U.K.-China Joint Declaration regarding the 1997 reversion of Hong Kong ("Joint Declaration") and the proposed Basic Law of the Hong Kong Special Administrative Region ("Basic Law") guarantee that the existing laws and judicial system of Hong Kong will remain intact after 1997. (App. F at A-14.) However, as a leading commentator on these matters has stated:

> A joint declaration is more an announcement of intention rather than a binding treaty . . . , the document amounts to a mere unilateral declaration of policy by the PRC towards the

---

[8] *See* Senator Pete Wilson's October 19, 1988, letter to Secretary Shultz (reflecting disagreement with the Ninth Circuit's Treaty interpretation). (App. Y at A-113-A-114.)

> Hong Kong people. . . . Should Beijing renege on its promises later, the British government would be in no position to help the people of Hong Kong other than to give moral support.

(App. BB at A-126.) (*See also id.* at A-127-A-129; App. W at A-107; App. X at A-110-A-112.) The Basic Law has been criticized for failing to implement important provisions of the Joint Declaration. (App. AA at A-118-A-123.) Moreover, since the Basic Law grants the Standing Committee of the National People's Congress of the People's Republic of China the power to invalidate any existing Hong Kong laws that it finds inconsistent with the Basic Law, and to interpret the meaning of the provisions of the Basic Law, it is China, not Hong Kong, that has the power to decide whether Hong Kong's existing laws remain in effect after 1997. (*See* App. Z at A-115-A-117; App. BB at A-125-A-131.) Thus, neither the Joint Declaration nor the Draft Basic Law can mitigate Hong Kong's failure to satisfy the rule of specialty as required by the Treaty.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE RIGHT OF THE ACCUSED TO CHALLENGE THE ACCURACY AND RELIABILITY OF TRANSLATED WRITTEN TESTIMONY

The bulk of the probable cause "evidence" against Mr. Oen is contained in ten English-language "affirmations" (*i.e.*, affidavits) signed by Chinese-speaking witnesses who do not speak or read English. (*See* CR 10 at 975-985; CR 11 at 1295-99.) Although these affirmations resulted from a flawed and highly questionable police interview and translation process, and were replete with odd locutions, grammatical and syntactical errors, and incoherent passages, Mr. Oen was denied the opportunity to examine the witnesses' written Chinese statements on which the English affirmations were based. Denying Mr. Oen the opportunity to challenge the accuracy of the government's translations violated due process and undermined the integrity of the extradition court's probable cause finding. Certiorari should be granted to clarify the due process requirements for presenting translated testimony in extradition proceedings, an issue that will repeatedly arise.

Mr. Oen presented uncontested testimony of an expert in Chinese-to-English translation, who, after analyzing the errors in syntax and grammar present in the ten affirmations, concluded that more than one translator was involved in drafting them, that at least one of the translators was of dubious ability, and that there may be more serious translation errors than those readily apparent to the reader of the English texts. (App. R at A-63-A-64.) Accordingly, Mr. Oen sought the exclusion of the ten affirmations or, alternatively, the production of the original written witness statements from which the affirmations were derived.

The extradition court initially ruled as follows:

> [T]he defense is certainly entitled to see the original [written witness statements] and compare the original to the translation and to verify the translation.
>
> The defense has made a fairly strong case that there are, obviously, areas of I won't say incompetent translation, but translation that raises substantial question about the competency of the translator.

(App. G at A-23.)

After initially denying the existence of any Chinese written statements (CR 11 at 1103 n.1; App. G at 24), the government conceded their existence (CR 12 at 1405-06; App. I at A-30), but continued to resist their production on the ground that if Mr. Oen were given the witnesses' original statements,

> the Court would thereafter be provided by the defense with a detailed list of the differences between the contents of these statements and the submitted affirmations.

(CR 12 at 1515.) Of course, the government's concession of "differences" between the original written statements and the affirmations only made more urgent Mr. Oen's request for production; Mr. Oen's expert had correctly concluded that the translations were flawed. The cause of these flaws was revealed by the government's disclosure of the questionable process by which the ten affirmations were created—a process rife with opportunity for misunderstandings, poor translations, and police biases to

adversely affect the reliability and competence of the affirmations.[9]

Mr. Oen should have been allowed to examine the written Chinese statements and to challenge the accuracy of the translations. Since the exact connotation given to foreign words may determine whether probable cause exists, fairness requires that foreign-language testimony submitted against an accused be accurately translated. *See People v. Gutierrez*, 137 Cal. App. 3d 542, 546-47, 187 Cal. Rptr. 130 (1982); 5 Wigmore, *Wigmore on Evidence* § 1393 at 146 (Chadbourn Rev. 1974). Likewise, due process requires that a party facing extradition be given the opportunity to challenge the accuracy of the government's translations and to offer his own translations. *In re Artukovic*, 628 F. Supp. 1370, 1376 (C.D. Cal. 1986). *See also Escobedo v. United States*, 623 F.2d 1098, 1103 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980).

The Ninth Circuit sidestepped this issue by assuming that the district court's finding that there were no original written Chinese statements was not clearly erroneous. (App. F at A-16-A-17.) This is a total misreading of the record.[10] Chief Inspector Ip Lau

---

[9] The ten affirmations were created as follows: the witnesses gave oral statements in Cantonese, which were transcribed in Chinese by police officers; the written Chinese statements were reviewed and signed by the witnesses; these written statements were then translated into English by different police officers; the English translations were given to still other police officers who altered them and converted them into English-language "affirmations." (App. V at A-99-A-103; CR 12 at 1453-55, 1521-24.) The alterations were purportedly made so that the statements would progress in a more "coherent" manner in English. (App. U at A-97.) Police officers made further changes in the text of the affirmations, purportedly to improve their coherency and grammar. (*Id.*) Thus, by the time the government submitted the affirmations, the witnesses' original statements had been re-worked by four layers of police personnel.

[10] Although this Court generally is reluctant to set aside reasonable conclusions of lower courts on purely factual issues, it "has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resolution." *Berenyi v. Immigration Director*, 385 U.S. 630, 636 (1967). Here, due process is implicated by

Chuen's affidavit clearly refers to *signed written witness statements in Chinese:*

> Evidence elicited from the interview would then be recorded in the statement format. Whenever draft statements had been prepared they would be handed to the witnesses for them to make any correction, deletion or insertion, if they so required. The *statements* would then be *finalized* or *rewritten* if necessary prior to the *witnesses signing them.*

(App. V at A-101; emphasis added.) Moreover, the case agent, Lulu Yui, submitted an affidavit that unequivocally demonstrated that the ten challenged affirmations were based upon the witnesses' written Chinese statements. (App. U at A-95.)

Given Mr. Oen's undisputed evidence regarding the affirmations' unreliability and given the government's revelations regarding the flawed interview/translation process, due process required production of the original witness statements to enable Mr. Oen to test whether the ten affirmations accurately reflected the witnesses' testimony.

III. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE RIGHT OF THE ACCUSED TO CROSS-EXAMINE WITNESSES PRESENT AT THE EXTRADITION HEARING

Mr. Oen sought to cross-examine the case agent, Lulu Yui, who had submitted key affidavit testimony[11] (App. U at A-93-A-98) and who was present in the courtroom during the extradition hearing. (App. I at A-36-A-37.) Although the extradition court initially stated that cross-examination was appropriate, it denied

---

the refusal to permit Mr. Oen to challenge the accuracy of the translated testimony that was at the heart of the government's case.

[11]Agent Yui's affidavit was the linchpin for admission of the ten challenged English-language affirmations, which in turn were essential to the court's finding of probable cause. Yui oversaw the process by which the English-language affirmations were crafted by the Hong Kong police. She drafted and edited a number of them personally. (App. U at A-95-A-98.) Without her testimony, the ten affirmations were, in the court's view, "totally meaningless." (App. G at A-23-A-24.)

the defense request when the government "strongly" objected. (*Id.*) This denial was a deprivation of due process.

In *Grin v. Shine*, 187 U.S. 181, 184 (1902), this Court observed that extradition procedures are governed by "well-settled principles of criminal procedure . . . ." One of the oldest of these principles is the accused's right to be confronted with the witnesses against him.

> This language [regarding confrontation] "comes to us on faded parchment" . . . with a lineage that traces back to the beginnings of Western legal culture.

Coy v. Iowa, ____ U.S. ____, 108 S. Ct. 2798, 2800 (1988) (citations omitted). The right of cross-examination has been described as "the principal means by which the believability of a witness and the truth of his testimony are tested . . . " and the "greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. ____, 107 S. Ct. 2658, 2662 (1987) (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974) and *California v. Green*, 399 U.S. 149, 158 (1970)). It is "essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Id.*

In affirming the extradition court, the Ninth Circuit announced the sweeping rule that an accused in an extradition proceeding does not have the right of cross-examination, even when the government witness is present in the courtroom. (App. F at A-18-A-19.) Neither of the cases relied upon by the Ninth Circuit reached this result. *See Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984); *Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980). Other authority holding that an accused generally does not have the right to cross-examination in an extradition proceeding is based upon the practical policy decision that a foreign country should not be put to the cost and inconvenience of transporting a witness to this country. *See Bingham v. Bradley*, 241 U.S. 511, 517 (1916), *cited by Simmons v. Braun*. In *Bingham*, the inconvenience to the foreign government outweighed the accused's right to cross-examination.

By contrast, here, it is undisputed that the government witness was present in the courtroom, and that no undue cost or inconve-

nience could have resulted from cross-examination. (App. I at A-36-A-37.)

The Ninth Circuit's new rule goes beyond prior case law, has no sound policy rationale, and contradicts case authority holding that an accused facing extradition is entitled to due process. *See Caltagirone v. Grant*, 629 F.2d 739, 748 & n.19 (2d Cir. 1980); *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980). As this Court has stated:

> Good faith toward foreign powers, with which we have entered into treaties of extradition, does not require us to surrender persons charged with crime in violation of those well-settled principles of criminal procedure which from time immemorial have characterized Anglo-Saxon jurisprudence. Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defenses as others accused of crime within our own jurisdiction. . . . These treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused.

Grin v. Shine, 187 U.S. at 184. Certiorari should be granted to reconcile *Grin* and *Bingham*, and to clarify that the accused does have the fundamental right to cross-examine government witnesses present at the extradition hearing.[12]

---

[12] The bill before Congress in 1983 designed to reform this nation's extradition laws (H.R. 2643) provided the accused the right to "confront and cross-examine witnesses." *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 34 (1983), at 10. The Justice Department, concurring that our extradition laws were "very outdated," supported another bill which differed from H.R. 2643 on the issue of bail, but otherwise was in general accord. *Id.* at 36. None of the extradition reform bills was passed, and attempts at legislative reform have come to a halt. Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441, 1442 (1988).

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A DISTRICT COURT HEARING AN EXTRADITION REQUEST MAY EXCLUDE INCOMPETENT EVIDENCE

Mr. Oen made over 180 objections to the written affirmations submitted by the Hong Kong government. (CR 10 at 806-906, 935-39.) The affirmations contained multiple hearsay, statements lacking foundation, and incompetent opinions. The extradition court refused to consider these objections and the Ninth Circuit affirmed that refusal. In the Ninth Circuit's view, 18 U.S.C. § 3190 requires district courts to admit all evidence submitted to them by a foreign government, as long as a United States consular officer has certified the evidence as authentic. (App. F at A-17-A-18.) This holding—which strips district courts of the power to judge the competency of evidence presented to them—is in direct conflict with the opinion of the First Circuit in *Greci v. Birknes*, 527 F.2d 956, 959-60 (1st Cir. 1976), and with the traditional practices of the federal courts. Certiorari should be granted to resolve this conflict.

Section 3190 provides that items offered in an extradition proceeding

> shall be received and admitted as evidence on such hearing for all purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country . . . and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

According to the Ninth Circuit, "authentication is the only requirement for admissibility of evidence under general United States extradition law." (App. F at A-17-A-18.) Thus, Mr. Oen's "challenges to the reliability and competency of the evidence fail." (*Id.* at A-18.) This holding means that an extradition court must unquestioningly accept whatever evidence is spoon fed to it by a foreign prosecutor.

This result was rejected by the First Circuit in *Greci v. Birknes*. There, the materials submitted by the foreign government had been certified by the U.S. Ambassador to Italy under section 3190. 527 F.2d at 959. The accused objected that the evidence was not sworn as required by the extradition treaty. *Id.* at 959-60. The government argued that the evidence was nonetheless admissible because it had been authenticated under section 3190. *Id.* at 960. The court rejected this argument. *Id.* at 960-61. A direct conflict exists between the First Circuit's *Greci* decision and the Ninth Circuit's decision below.

The Ninth Circuit's decision is likewise in conflict with the practice traditionally followed by federal courts. This Court has held that "[t]he function of the committing magistrate [in extradition] is to determine whether there is *competent* evidence to justify holding the accused to await trial. . . ." *Collins v. Loisel*, 259 U.S. 309, 316 (1922) (emphasis added; citations omitted).

Accordingly, district courts hearing extradition requests can and do exclude incompetent evidence. *See, e.g., In re Sindona*, 450 F. Supp. 672, 679-80 (S.D.N.Y. 1978) (sustaining accused's objections to eight depositions for failure to comply with Treaty requirements); *United States v. Artukovic*, 170 F. Supp. 383, 391 (S.D. Cal. 1959) (excluding affidavits "because the affiants testified to matters of which they could not possibly have personal knowledge"). *But cf. In re Assarsson*, 635 F.2d 1237, 1246 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981).

Even the Ninth Circuit in *Zanazanian v. United States*, 729 F.2d 624 (9th Cir. 1984), indicated that certification of evidence under section 3190 did not make it automatically admissible. In *Zanazanian*, the court considered the admissibility of certain double hearsay evidence—a police officer's statement summarizing statements of other witnesses. Although the officer's statement had been certified under section 3190, it was deemed admissible only because there were sufficient indicia of the reliability of the hearsay it contained. *Id.* at 627-28. If the *Zanazanian* court had considered section 3190 certification sufficient, analysis of the reliability of the hearsay would have been unnecessary.

But for the lower courts' view of section 3190, Mr. Oen's objections would have required consideration. First, the Hong Kong government presented the extradition court with unreliable multiple hearsay statements, a practice upon which the *Zanazanian* decision and others cast doubt. *See* 729 F.2d at 627. Unlike the police officer's statement in *Zanazanian*, the affirmations here often failed to identify the hearsay declarants whose statements were repeated.[13] The affirmations also purported to repeat the statements of third persons whose own testimony, also submitted, did not corroborate the statements.[14]

Second, the Hong Kong government presented evidence lacking foundation, a practice rejected in *United States v. Artukovic*, 170 F. Supp. at 391. The affirmations contained numerous conclusory statements by Union Bank personnel imputing responsibility for all aspects of bank transactions to Mr. Oen. Most of this evidence lacked facts establishing the witnesses' knowledge of Mr. Oen's involvement in Union Bank affairs.[15]

---

[13] In relation to a repayment of one of the allegedly false loans, Jonathan Newman, Union Bank's general manager, testified:

> [I]t was indicated to us by members of the management of the Union Bank of Hong Kong that this token payment could actually have been made by Mr OEN Yin-choy himself and not the [borrowing] company.

(CR 16 at 1096.) Mr. Newman did not identify the source of this hearsay.

[14] Lee Yue-wing, for example, stated that "OEN Yin-choy instructed HIOE Mie-joeng in my department to be fully responsible for handling all matters relating to [ACU deposits]." (CR 15 at 448.) But Ms. Hioe testified that Lee Yue-wing gave her these instructions. (CR 15 at 570.)

[15] For example, Paul Kaseger, a member of Union Bank's Loans Committee, stated: "I was given to understand when the loans [*sic*] applications were presented that all these Indonesian loans had already been approved by the Chairman. . . ." (CR 15 at 708.) Mr. Kaseger supplied no basis for this statement.

Third, the Hong Kong government presented the extradition court with unqualified legal conclusions.[16] Legal conclusions of lay witnesses do not constitute competent evidence. *See Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977); 7 Wigmore, *Wigmore on Evidence* § 1953 at 103 (Chadbourn Rev. 1978).

Because of the Ninth Circuit's view of section 3190, none of this incompetent evidence was excluded. That view is in conflict with the view of at least one other circuit and with the role that federal courts have traditionally played. Following that view breaches the obligation of the extradition court to exclude incompetent evidence, as set forth in *Collins v. Loisel.*

Additionally, if the Ninth Circuit's interpretation of section 3190 were correct, *i.e.*, that section 3190 grants consular officials—employees of the executive branch—power to determine the competency of evidence before a court, then section 3190 would violate the separation of powers. The Constitution's separation of powers is a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The risk of encroachment on the judiciary's independence exists when " 'any matter which, from its nature, . . . ' has traditionally been tried in Article III courts," is withdrawn and allocated to a non-Article III officer. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 854 (1986) (*quoting Murray's Lessee v. Hoboken Land and Improv. Co.*, 60 U.S. (18 How.) 272, 284 (1856)).

This Court recognized the Article III character of judging the quality of evidence in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). There, the Court found constitutionally infirm a statute whereby "the court [was] forbidden to give the effect to

---

[16] The courts below placed heavy reliance on the affirmation of J.M.H. Grimsdick, the Hong Kong government's accountant (CR 14 at 238-39), in ruling on the issue of loan falsity. (App. F at A-20; CR 12 at 1559; Nov. 6, 1987 Habeas Petition Hearing Tr. at 18-19.) Much of Mr. Grimsdick's testimony consisted of his legal opinions. For example, he repeatedly opined that the loan forms at issue were "misleading and false." (*See, e.g.*, CR 14 at 242.)

evidence which, in its own judgment, such evidence should have, and [was] directed to give it an effect precisely contrary." *Id.* at 147. Since, according to the Ninth Circuit, section 3190 contains the same type of prohibition, that statute contains the same infirmity. The Ninth Circuit's interpretation of section 3190 therefore must be rejected. Whenever possible, federal courts must interpret acts of Congress to avoid constitutional infirmity. *See, e.g., United States v. Security Indus. Bank*, 459 U.S. 70, 78-79 (1982). The First Circuit's *Greci* decision correctly interprets section 3190 and should be followed.

V. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A DISTRICT COURT JUDGE MAY HEAR A HABEAS CORPUS PETITION CHALLENGING THAT JUDGE'S CERTIFICATION OF EXTRADITABILITY

District Judge Robert H. Schnacke granted the request for extradition. Judge Schnacke's decision was not appealable and could be contested only by a petition for a writ of habeas corpus under 28 U.S.C. § 2241. *Plaster v. United States*, 720 F.2d 340, 349 (4th Cir. 1983). When Mr. Oen's habeas petition, pursuant to the district court's "related case" rule, was re- assigned to Judge Schnacke, Mr. Oen requested Judge Schnacke to disqualify himself under 28 U.S.C. § 455(a). (CR 3, 4.) Judge Schnacke denied that request. (App. K at A-41.) The Ninth Circuit affirmed, holding that a judge who presides over an extradition hearing may hear a habeas petition in the same matter. (App. F at A-21-A-22.) The Ninth Circuit followed opinions of the Sixth and Seventh Circuits,[17] but ignored the conflicting reasoning of the Fourth Circuit's decision in *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978). Certiorari should be granted to resolve this conflict regarding whether a district court

---

[17] *See Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *David v. Attorney General*, 699 F.2d 411, 416-17 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983).

judge must recuse himself in habeas proceedings initiated to review his own extradition ruling.[18]

In *Rice v. McKenzie*, petitioner's habeas petition was assigned to a district judge who participated in rejection of the same claims while sitting on the state supreme court. The Fourth Circuit held that recusal under section 455(a) was mandated. Relying in part upon 28 U.S.C. § 47, which prohibits a federal judge from sitting to hear or determine an appeal in a case he tried, the court reasoned that the habeas judge was, in effect, being asked to review proceedings below. *Id.* at 1117. In such a case, "the likelihood of the presence of partiality is sufficiently great to support a rule of absolute disqualification." *Id.* at 1118. Recusal under section 455(a) was ordered even though there was no indication of personal bias or prejudice. *Id.* at 1115-16. *See also Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 108 S. Ct. 2194, 2203 (1988) ("Scienter is not an element of a violation of § 455(a). . . . [T]he purpose of the provision [is] to promote confidence in the integrity of the judicial process . . . ." (citation omitted)).

The reasoning of *Rice v. McKenzie* is compelling in the extradition context. The district judge sits as a reviewing court to review the extradition proceedings. *Shapiro v. Ferrandina*, 355 F. Supp. at 563, 567. The independent review required by a writ of habeas corpus, *Fay v. Noia*, 372 U.S. 391, 423-24 (1963), can be provided only by a judge who did not hear the extradition proceedings. "While it is unusual for one District Judge to be required to review the action of another District Judge, there is no

---

[18] This issue is avoided in many districts by assigning the extradition request to a magistrate. *See* Local Rule (L.R.) 501-1(c), S.D. Cal.; L.R. 32.1(a)(3), M.D. Ala.; L.R. 19.01(a)(1), D.S.C.; Local Magistrate Rule (L.M.R.) 1.(a)(11), E.D. Wash.; L.R. 13.01(a)2, E.D. Wis.; L.M.R. 1(e), D. Mass.; and L.M.R. 9, S.D.N.Y. and E.D.N.Y. If the magistrate grants extradition, habeas review occurs before a district court judge. Other courts assign extradition proceedings to district court judges but have a different judge hear the habeas proceedings. *See Shapiro v. Ferrandina*, 355 F. Supp. 563, 567 (S.D.N.Y.), *modified and aff'd*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

escape from the necessity to do so in extradition proceedings . . . ." *Shapiro v. Ferrandina*, 355 F. Supp. at 567.

In *David v. Attorney General*, the Seventh Circuit refused to follow *Rice v. McKenzie* for two reasons. First, the court asserted that the *Rice* reasoning would require that any case reversed on appeal be assigned to a different judge on remand. 699 F.2d at 416. A similar argument was made by the Ninth Circuit here. (App. F at A-21-A-22.) Second, the *David* court found that since habeas petitions under 28 U.S.C. § 2255 are heard by the judge who presided at the petitioner's trial, there was no *per se* impropriety in a judge ruling on a collateral attack against his own decision. 699 F.2d at 416.[19] This argument was also the basis for the Sixth Circuit's decision in *Demjanjuk v. Petrovsky*, 776 F.2d at 577.

Neither argument is persuasive. First, the circumstance of a district judge presiding over a retrial following a reversal is inapposite. The judge is not asked to "sit as a reviewing court" of his own proceedings. *Shapiro v. Ferrandina*, 355 F. Supp. at 567. Second, proceedings under section 2255 are not analogous to the section 2241 challenge of an extradition order. The petitioner in section 2255 proceedings has a full right of appeal. The only review of an extradition order is by a habeas petition. This unique circumstance dictates the fashioning of a special rule for extradition cases. This Court should grant certiorari to settle whether such a special rule should be adopted.

VI. CERTIORARI SHOULD BE GRANTED TO CLARIFY WHAT EVIDENCE AN ACCUSED MAY PRESENT IN OPPOSING HIS EXTRADITION

In *Collins v. Loisel*, 259 U.S. 309, 316-17 (1922), this Court held that the accused in extradition proceedings may introduce "explanatory" but not "contradictory" evidence on probable cause. Application of that rule has proved difficult, as illustrated

---

[19] The *David* court did recognize, of course, that Rule 4(a) of the Rules Governing Section 2255 Proceedings was not controlling in habeas proceedings brought under 28 U.S.C. § 2241. 699 F.2d at 416.

by this case. Those difficulties make granting certiorari to clarify *Collins* appropriate.

In *Collins*, this Court stated:

> To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government.

259 U.S. at 316-17 (*quoting Charlton v. Kelly*, 229 U.S. 447 (1913)). *Collins* has been interpreted to mean that "the accused has no right to introduce evidence which merely contradicts the demanding country's proof. . . . [T]he accused has the right to introduce evidence that is 'explanatory' of the demanding country's proof." *In re Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978). *Accord In re D'Amico*, 185 F. Supp. 925, 930 (S.D.N.Y. 1960), *appeal dismissed*, 286 F.2d 320 (2d Cir.), *cert. denied*, 366 U.S. 963 (1961).

However, "[t]he distinction between 'contradictory evidence' and 'explanatory evidence' is difficult to articulate." *In re Sindona*, 450 F. Supp. at 685. "Courts have struggled to clarify the distinction." *Republic of France v. Moghadam*, 617 F. Supp. 777, 782 (N.D. Cal. 1985). *See also Freedman v. United States*, 437 F. Supp. 1252, 1266 (N.D. Ga. 1977). Some courts have held that "evidence which 'tends to obliterate probable cause may be considered . . . .'" *Freedman v. United States*, 437 F. Supp. 1252, 1266 (N.D. Ga. 1977) (quoting *Shapiro v. Ferrandina*, 355 F. Supp. at 572); *Republic of France v. Moghadam*, 617 F. Supp. at 782.

Mr. Oen presented the district court with evidence that the Hong Kong government's theory of probable cause was illogical and unsupported. The district court refused to consider this evidence, characterizing it as "contradictory." The Ninth Circuit affirmed. This characterization is inconsistent with *Collins*.

An essential element of the false accounting charges against Mr. Oen is falsity of the loans; thus, to obtain extradition, the Hong Kong government must establish probable cause of such falsity. (*See* App. D at A-8.) The Hong Kong government based

its showing of falsity on the affirmation of its accountant, J.M.H. Grimsdick. Mr. Grimsdick testified that the loan proceeds were not disbursed directly to the named borrowers (CR 14 at 241-52), that he was unable to find written documentation that the named borrowers requested the loan proceeds to be disbursed as they were (*id.* at 242, 244, 246, 248, 250, 252), and that the disbursement pattern was "unduly complex." (*Id.* at 384.) He therefore concluded the loans were false. (*Id.* at 385.)

Mr. Oen submitted the affidavit of David Mace, an accountant and partner of the firm of Arthur Young in Hong Kong. (App. S at A-68-A-71.) Mr. Mace explained that there are numerous legitimate commercial loans in which the loan proceeds are not paid directly to the borrower (*id.* at A-70), and that such payments do not suggest that the loans were false. (*Id.*) Nor do "complex disbursement patterns" suggest falsity. (*Id.*) Moreover, the Hong Kong government's evidence established that when its investigators met with the borrowers, they acknowledged their indebtedness and discussed repayment.[20] Mr. Mace testified that in view of the borrowers' statements, Mr. Grimsdick's conclusions of loan falsity "lack a proper commercial (or logical) basis." (*Id.* at A-71.)

The district court refused to consider Mr. Mace's testimony. When it was raised by Mr. Oen's counsel in the extradition hearing, the district court stated: "What you are suggesting are matters of defense that may well be persuasive when this matter comes to trial in Hong Kong." (CR 12 at 1566.) When Mr. Mace's testimony was raised at the hearing on the habeas petition, the district court stated: "I am sure that will be valuable evidence at the trial . . . [b]ut we don't take conflicting evidence

---

[20] Jonathan Newman met twice with Mr. Susanto, the representative of Sinar, the borrower on Counts 1 and 2. Mr. Susanto acknowledged the loans and offered to sell Sinar's assets to repay them. (CR 16 at 1092-93.) Mr. Newman also met with Mr. Muyono, representing Roxy, the borrower on Count 3. Mr. Muyono acknowledged the loan and asked for three more years to pay. (CR 16 at 1093-94, 1096.) Mr. Newman met with Mr. Salim, representing Gaya, the borrower on Count 4. He, too, discussed repayment arrangements. (CR 16 at 1095.)

here." (App. L at A-49.) The Ninth Circuit affirmed the district court's finding of probable cause on the basis of Mr. Grimsdick's testimony (App. F at A-20), and ignored Mr. Mace's testimony. The Ninth Circuit rejected Mr. Oen's argument for rehearing that the court was required to consider Mr. Mace's explanatory evidence. (*See* Petition for Rehearing, filed in the U.S. Court of Appeals for the Ninth Circuit, at 12.)

The courts below misinterpreted *Collins* when they characterized Mr. Mace's testimony as contradictory. Mr. Mace *explained* that the facts that the Hong Kong government was relying upon were not "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of [Mr. Oen's] guilt." *See Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973) (defining probable cause).[21] Evidence that explains why the foreign government's theory of probable cause is illogical and unsupported should be admitted and considered under *Collins*. Such evidence "rebut[s] probable cause." *Collins*, 259 U.S. at 316. Certiorari should be granted to correct the conflicting holding of the Ninth Circuit and to clarify the *Collins* rule.

---

[21] *Coleman* defines probable cause for preliminary examinations. In extradition proceedings, probable cause is measured by the standard applicable in preliminary examinations. *Charlton v. Kelly*, 229 U.S. at 460.

CONCLUSION

For the above reasons, Mr. Oen respectfully requests this Court to grant his petition for a writ of certiorari.

Dated: March 7, 1989

Respectfully submitted,

CEDRIC C. CHAO
Counsel of Record
MICHAEL M. CARLSON
JENNY D. SMITH
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
(415) 434-7000

By CEDRIC C. CHAO
Counsel for Petitioner
Oen Yin-choy

88-1481

No.

Supreme Court, U.S.
FILED
MAR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

OEN YIN-CHOY,
Petitioner,

VS.

GLEN S. ROBINSON,
United States Marshal
for the Northern District of California,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CEDRIC C. CHAO
Counsel of Record
MICHAEL M. CARLSON
JENNY D. SMITH
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
(415) 434-7000

Counsel for Petitioner
Oen Yin-choy

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

1350

TABLE OF CONTENTS

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Appendix		Page
A	Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468, Articles I, III, IV, VII(5) and XII(1)	A-1
B	Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Signed at London on 8 June 1972, Articles 1, 2, 3 and 5 ..	A-4
C	18 U.S.C. § 3190	A-7
D	Hong Kong Theft Ordinance, § 19(1)a and § 21(a)	A-8
E	28 U.S.C. § 455(a)	A-9
F	Opinion, *Oen Yin-choy, Petitioner-Appellant v. Glen S. Robinson, U.S. Marshal for the Northern District of California, Respondent-Appellee*, United States District Court of Appeals, Ninth Circuit, October 5, 1988	A-10
G	Excerpts of Transcript of Proceedings, U.S. District Court for the Northern District of California, August 7, 1987	A-23
H	Order re: Oen Yin-choy's Prehearing Motions, U.S. District Court for the Northern District of California, filed August 14, 1987	A-27
I	Excerpts of Transcript of Proceedings, U.S. District Court for the Northern District of California, August 31, 1987	A-29
J	Certification of Extraditability, U.S. District Court for the Northern District of California, filed September 4, 1987	A-39

TABLE OF CONTENTS—CONTINUED

Appendix		Page
K	Order (denying motion to disqualify judge under 28 U.S.C. § 2441), U.S. District Court for the Northern District of California, filed October 6, 1987	A-41
L	Excerpts of Transcript of Proceedings. U.S. District Court for the Northern District of California, November 6, 1987	A-42
M	Amendment to Certification of Extraditability, U.S. District Court for the Northern District of California, filed November 12, 1987	A-51
N	Order (denying petition for a writ of habeas corpus), U.S. District Court for the Northern District of California, filed November 13, 1987	A-53
O	Order (denying motion for rehearing and rejecting suggestion for rehearing *en banc*; granting motion to file addendum to the petition for rehearing; and vacating stay), U.S. Court of Appeals for the Ninth Circuit, filed December 7, 1988	A-55
P	Order (granting motion for stay of extradition pending filing and resolution of a petition for a writ of certiorari), U.S. Court of Appeals for the Ninth Circuit, filed December 12, 1988	A-56
Q	Order (clarifying orders of December 7, 1988 and December 12, 1988), U.S. Court of Appeals for the Ninth Circuit, filed December 28, 1988	A-57
R	Declaration of Ellen Lai-Shan Yeung In Support of Oen's Motion for Cantonese Originals of Government Affirmations, U.S. District Court for the Northern District of California, filed July 17, 1987	A-58
S	Second Affidavit of David William Mace, U.S. District Court for the Northern District of California, filed August 17, 1987	A-68
T	Declaration of Professor Hungdah Chiu In Opposition to Extradition Request, U.S. District Court for the Northern District of California, filed July 18, 1987	A-72

TABLE OF CONTENTS—CONTINUED

Appendix		Page
U	Affirmation of Lulu Yui, U.S. District Court for the Northern District of California, signed August 14, 1987	A-93
V	Affidavit of Ip Lau-Chuen, U.S. District Court for the Northern District of California, signed August 14, 1987	A-99
W	Table of Contents to Addendum to Oen Yin-choy's Petition for Rehearing and Suggestion for Rehearing *En Banc*, U.S. Court of Appeals for the Ninth Circuit, filed October 19, 1988	— A-106
X	Table of Contents to Supplemental Addendum to Oen Yin-choy's Petition for Rehearing and Suggestion for Rehearing *En Banc*, U.S. Court of Appeals for the Ninth Circuit, filed October 28, 1988	A-108
Y	Letter dated October 19, 1988 from the Honorable Pete Wilson, United States Senate, to the Honorable George P. Shultz, Secretary, U.S. Department of State	A-113
Z	The Draft Basic Law of Hong Kong Special Administrative Region of the People's Republic of China (For Solicitation of Opinions), Chapter II, Article 16; Chapter IX, Article 169; and Chapter X, Article 172; April, 1988	A-115
AA	Summary of Comments Presented by Amnesty International in a Memorandum on the Draft Basic Law of Hong Kong, July, 1988	A-118
BB	Excerpts from *The Basic Law and Hong Kong's Future* (Wesley-Smith & Chen 1988)	A-124

APPENDIX A

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468

* * *

ARTICLE I

Each Contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, any person found in its territory who has been accused or convicted of any offense within Article III, commited within the jurisdiction of the other Party.

* * *

ARTICLE III

(1) Extradition shall be granted for an act or omission the facts of which disclose an offense within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty, or any other offense, if:

(a) the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty;

(b) the offense is extraditable under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of subparagraph (1)(a) of Article II; and

(c) the offense constitutes a felony under the law of the United States of America.

* * *

ARTICLE IV

If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the

requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

* * *

ARTICLE VII

* * *

(5) The warrant of arrest, or the judicial document establishing the existence of the conviction, and any deposition or statement or other evidence given on oath or affirmed, or any certified copy thereof shall be received in evidence in any proceedings for extradition:

(a) if it is authenticated in the case of a warrant by being signed, or in the case of any other original document by being certified, by a judge, magistrate or other competent authority of the requesting Party, or in the case of a copy by being so certified to be a true copy of the original; and

(b) where the requesting Party is the United Kingdom, by being sealed with the official seal of the appropriate Minister and certified by the principal diplomatic or consular officer of the United States of America in the United Kingdom; and where the requesting Party is the United States of America, by being sealed with the official seal of the Department of State for the Secretary of State; or

(c) if it is authenticated in such other manner as may be permitted by the law of the requested Party.

* * *

ARTICLE XII

(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State—

(a) until after he has returned to the territory of the requested Party; or

(b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

* * *

APPENDIX B

SUPPLEMENTARY TREATY CONCERNING THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, SIGNED AT LONDON ON 8 JUNE 1972

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at London on 8 June 1972 (hereinafter referred to as "the Extradition Treaty");

Have resolved to conclude a Supplementary Treaty and have agreed as follows:

ARTICLE 1

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

(a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;

(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;

(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;

(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person;

(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

ARTICLE 2

Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party.

In determining whether an individual is extraditable from the United States, the judicial authority of the United States shall permit the individual sought to present evidence on the questions of whether:

(1) there is probable cause;

(2) a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the courts, exists; and

(3) the act upon which the request for extradition is based would constitute an offense punishable under the laws of the United States.

Probable cause means whether there is sufficient evidence to warrant a man of reasonable caution in the belief that:

(1) the person arrested or summoned to appear is the person sought;

(2) in the case of a person accused of having committed a crime, an offense has been committed by the accused; and

(3) in the case of a person alleged to have been convicted of an offense, a certificate of conviction or other evidence of conviction or criminality exists.

ARTICLE 3

(a) Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority

by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.

(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for offenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals processes.

* * *

ARTICLE 5

This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

* * *

APPENDIX C

18 U.S.C. § 3190

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition cases shall be received and admitted as evidence on such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

APPENDIX D

HONG KONG THEFT ORDINANCE

§ 19(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another—

(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose;

* * *

he shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 7 years.

§ 21(1) Where an officer of a body corporate or unincorporated association (or person purporting to act as such) with intent to deceive members or creditors of the body corporate or association about its affairs, publishes or concurs in publishing a written statement or account which to his knowledge is or may be misleading, false or deceptive in a material particular, he shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 7 years.

APPENDIX E

28 U.S.C. § 455(a)

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

APPENDIX F

[858 F.2d 1400]

OEN YIN-CHOY,
Petitioner-Appellant,

v.

GLEN S. ROBINSON, U.S. Marshal for the
Northern District of California,
Respondent-Appellee.

No. 87-15055.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 11, 1988.

Decided Oct. 5, 1988.

Cedric C. Chao, Morrison & Foerster, San Francisco, Cal., for petitioner-appellant.

Eric J. Swenson, Asst. U.S. Atty., Dept. of Justice, San Francisco, Cal., for respondent-appellee.

Appeal from the United States District Court for the Northern District of California.

Before TANG, SCHROEDER and NELSON, Circuit Judges.

OPINION

SCHROEDER, Circuit Judge:

This is an appeal from the district court's denial of a petition for a writ of habeas corpus which the appellant filed to prevent his extradition to Hong Kong. The Crown Colony of Hong Kong seeks extradition of appellant Oen Yin-Choy from the United States to stand trial on six counts of false accounting and one count of publishing a false statement. The extradition proceeding is set against the historic backdrop of the scheduled reversion of Hong Kong from the United Kingdom to the People's Republic of China in 1997. Oen's principal contention is that he cannot lawfully be extradited under the applicable extradition Treaty

between the United States and the United Kingdom. Oen contends that as a result of the contemplated 1997 reversion he may find himself subject to the exercise of China's criminal jurisdiction, in violation of the Treaty. We hold that no part of the extradition Treaty bars the extradition ordered by the district court.

Oen also challenges the sufficiency and admissibility of evidence in the extradition proceeding. Because a certification of extraditability is not a final order, no direct appeal from the decision will lie and review is available only by way of a petition for habeas corpus. *Collins v. Miller,* 252 U.S. 364, 369 (1920); *Caplan v. Vokes,* 649 F.2d 1336, 1340 (9th Cir. 1981). The scope of review in such instances is restricted to inquiring whether (1) the extradition judge had jurisdiction to conduct extradition proceedings; (2) the extradition court had jurisdiction over the fugitive; (3) the Treaty of extradition was in full force and effect; (4) the crime fell within the terms of the Treaty; and (5) there was competent legal evidence to support a finding of extraditability. *Emami v. United States Dist. Court for the N. Dist. of California*, 834 F.2d 1444, 1447 (9th Cir. 1987) (quoting *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978)). *See also Theron v. United States Marshal*, 832 F.2d 492, 495 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2830 (1988). Oen's claims are without merit under the limited standards applicable to review of extradition proceedings.

BACKGROUND

Extradition to the Crown Colony of Hong Kong is governed by the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland ("Treaty"), June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468, and by the Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland ("Supplementary Treaty"), ratified and entered into force December 23, 1986 (132 Cong. Rec. S9120 (daily ed. July 16, 1986)).

The United Kingdom leased the New Territories of Hong Kong from China in 1898 for a period of ninety-nine years. Convention of Beijing, June 9, 1898, in 1 *Treaties and Agreements with and Concerning China*, 1894-1919, 130, No. 1898/11 (1921). The remaining parts of Hong Kong were ceded to the United Kingdom in 1842 and 1860. *See* Comment, *The Reversion of Hong Kong to China: Legal and Practical Questions*, 21 Willamette L. Rev. 327 (1985). All of Hong Kong will revert to the People's Republic of China on July 1, 1997, pursuant to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong with Annexes, Beijing, December 19, 1984, ratified and entered into force May 27, 1985, T.S. No. 26 (1985), Cmnd. 9543 (joint declaration).

These extradition proceedings were instituted on April 15, 1987, by the United States Attorney on behalf of the Government of the United Kingdom and the Crown Colony of Hong Kong. After a two-part extradition hearing, the district court entered a certification of extraditability on September 4, 1987, and subsequently denied the petition for habeas corpus on November 13, 1987.

DISCUSSION

I. *The Lawfulness of the extradition under the Treaty.*

Oen argues that the district court lacked jurisdiction to order his extradition because the Hong Kong Government has not satisfied requirements of the extradition Treaty. His arguments are based upon Article XII(1) of the Treaty which provides that the party requesting extradition, in this case Hong Kong, shall not extradite the fugitive to a third state. It further provides that after being extraditied, the person shall not be charged with any offenses other than the offenses for which the party was extradited. The provision in relevant part reads as follows:

> [A] person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in

> respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State—(a) until after he has returned to the territory of the requested Party; or (b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

Treaty, Article XII(1). The requirement that an individual be tried only for offenses for which extradition has been sought is generally referred to as the principle of "speciality." *See Theron*, 832 F.2d at 496.

Oen first contends that if he is extradited and convicted, he may remain incarcerated in Hong Kong beyond July 1, 1997, the date on which full sovereign control over Hong Kong will revert to the People's Republic of China. He argues that if this scenario occurs, he will in effect have been extradited to China, a third state, in violation of the Treaty.

Even if Oen does remain in prison in 1997, the reversion of Hong Kong to Chinese authority does not result in an extradition within the meaning of Article XII(1). The Supreme Court long ago defined "extradition" as the "surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within territorial jurisdiction of another, which, being competent to try and to punish him, demands his surrender." *Terlinden v. Ames*, 184 U.S. 270, 289 (1902). We adopted that definition in *Stevenson v. United States*, 381 F.2d 142, 144 (9th Cir. 1967). Neither deportation nor surrender other than in response to a demand pursuant to Treaty constitutes extradition. *Id.*; *see also Emami*, 834 F.2d at 1453-54. Therefore, even if Oen becomes subject to Chinese authority pursuant to a reversion of sovereignty upon cession and termination of the British lease of Hong Kong, he will not have been extradited to China.

Oen also contends that if he remains in Hong Kong after the transition to Chinese control, he will become subject to Chinese law and may be prosecuted for additional offenses or be subject to additional penalties in violation of the principle of speciality. He maintains that so long as such a possibility exists, Hong Kong has

not met an implied condition in the extradition Treaty that Hong Kong will guarantee no prosecutions by successor governments. We find no support for such an interpretation.

The Treaty constitutes commitments between the United States and the United Kingdom on behalf of its Crown Colony. It does not purport to include commitments by successor governments or third states. *In re Tang*, 674 F. Supp. 1058, 1068-69 (S.D.N.Y. 1987). Were the Treaty to be interpreted as Oen asks, extradition to Hong Kong would be the exception rather than the rule because it would be limited in practice only to extraditions for crimes which could be punished for a term expiring before the reversion date. There is no indication that the United Kingdom and the United States had any such intention when they expressly made the Supplementary Extradition Treaty applicable to Hong Kong on January 1, 1988, at a time when the impending reversion was fully understood. *See* Exchange of Notes of August 19 and 29, 1986, December 23, 1986, and December 31, 1987.[1]

Oen's contention that Hong Kong has not met the requirements of the Extradition Treaty are groundless; thus, the district court had jurisdiction to determine Oen's extraditability.

II. *Dual Criminality*

Oen contends that his offenses are not extraditable because his conduct failed to satisfy elements of corresponding U.S. offenses.

---

[1] In addition, the Joint Declaration between the United Kingdom and China specifically provides that the laws previously in force in Hong Kong shall remain in effect unless they contravene the Basic Law of the Hong Kong Special Administrative Region. (Joint Declaration at 1, 5). The current judicial system will be maintained (*id.* at 5-6), individual liberties are guaranteed and the Joint Declaration explicitly states that the provisions of the International Covenant on Civil and Political Rights, in force March 23, 1966, G.A. Res. 2200A, 21 G.A.O.R., supp. (No. 16) 52, U.N. Doc. A/6316 (1966), and the Covenant on Economic, Social and Cultural Rights, in force January 3, 1976, G.A. Res. 2200A, 21 G.A.O.R., supp. (No. 16) 59, U.N. Doc. A/6316 (1966), shall remain in force. *Id.* at 12, Article 15(1) of the Civil and Political Covenant prohibits ex post facto laws and punishments and Article 14 guarantees rights of due process.

Under the principle of dual criminality, no offense is extraditable unless it describes conduct which is criminal in both jurisdictions. *Emami*, 834 F.2d at 1449. The Treaty at issue here expressly incorporates this principle. Treaty, Article III.

To satisfy dual criminality, the name by which the crime is described in the two countries need not be the same, nor does the scope of liability for the crime need to be the same. *See Emami*, 834 F.2d at 1450. "Rather, dual criminality exists if the 'essential character' of the acts criminalized by the law of each country are the same and if the laws are 'substantially analogous.' " *Theron*, 832 F.2d at 496 (quoting *Wright v. Henkel*, 190 U.S. 40, 58 (1903)). Thus, "each element of the offense purportedly committed in a foreign country need not be identical to the elements of a similar offense in the United States. It is enough that the conduct involved is criminal in both countries." *In re Russell*, 789 F.2d 801, 803 (9th Cir. 1986).

The offenses with which Oen is charged, false accounting and publishing a false statement, are listed in the schedule of offenses referred to in Article III of the Treaty. Thus, the Treaty specifically refers to the offenses with which Oen is charged, and the requirement of dual criminality is met. In addition, dual criminality is satisfied because the Hong Kong crimes of false accounting and publishing a false statement are substantially analogous to the federal crime of making a false entry in a bank statement. *See* 18 U.S.C. § 1005.[2] Hence, because the conduct involved is criminal in both countries, the requirement of dual criminality is satisfied. *See Russell*, 789 F.2d at 803. *See also Emami*, 834 F.2d at 1450 (dual criminality found where "[t]he substantive conduct each statute punishes is functionally identical").

Oen argues that the extradition court must make specific findings regarding dual criminality, and that it failed to do so. The extradition record, however, contains sufficient identification of corresponding offenses, as required by *Caplan*, 649 F.2d at 1344.

---

[2] Although the U.S. offense is not identical to the Hong Kong offenses, the essential character of the acts criminalized is the same. *See Theron*, 832 F.2d at 496.

III. *Evidentiary Issues*

Oen raises a number of challenges to the evidence, none of which merits lengthy discussion. The most substantial relate to the admission of ten witness statements translated from Chinese into English. Oen contends that the extradition court erred in admitting the ten translated affidavits because they were not sworn statements, as required under the Treaty. Oen also contends that the extradition court erred in denying him the opportunity to review the original Chinese statements that were translated into English, and by failing to consider objections to the competence of this evidence.

The Treaty requires that statements received in extradition proceedings be sworn or affirmed. Treaty, Article VII(5); *Zanazanian v. United States*, 729 F.2d 624, 627 (9th Cir. 1984). Oen essentially argues that because the witnesses could not understand the English translations, any affirmation pertaining to these statements is invalid. The extradition court and the habeas court made clear, however, that they were relying on the translator's affirmations that the witnesses were interrogated and the translations represented accurate translations of the witnesses's statements. Thus, it is irrelevant whether the witnesses's original statements were properly sworn.

Oen next argues that he should be permitted to review the witnesses's original ten Chinese statements. The extradition court concluded there were no original written Chinese statements by the witnesses; rather, the court found that there were only investigator's notes of the statements. The habeas court affirmed this conclusion.

The evidence on this point is unclear. Oen relies primarily on a government affidavit which appears to refer to original Chinese statements. Another affidavit states that evidence elicited from the interviews in Chinese were "recorded in the statement format," and that these drafts were handed to the witnesses for their revisions. However, the affidavits refer only to "statements" made in Chinese without specifying whether or not they were written or oral, and to "conversations" with the witnesses, which suggests there were no written statements. In addition, one police affidavit

states that the police conducted several interviews with certain individual witnesses, which also suggests there never were any original written statements. Because there is conflicting evidence on this point, the court's factual finding that there were no original Chinese statements in writing is not clearly erroneous. *See Quinn v. Robinson*, 783 F.2d 776, 791 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986) (factual findings reviewed under clearly erroneous standards).

Oen also argues that the extradition court erred by failing to consider over 180 objections to the competency of the government's evidence, including a challenge to the reliability and competency of the ten Chinese translations. The Extradition Treaty between the United States and Great Britain provides that:

> any deposition or statement or other evidence given on oath or affirmed, or any certified copy thereof shall be received in evidence in any proceedings for extradition (a) if it is authenticated . . . by a judge, magistrate or other competent authority of the requesting Party . . . and (b) where the requesting Party is the United Kingdom, by being sealed with the official seal of the appropriate Minister and certified by the principal diplomatic or consular officer of the United States of America in the United Kingdom . . . .

Treaty, Article VII(5)(b). In addition, 18 U.S.C. § 3190 which governs the admissibility of evidence in extradition cases, provides that items offered in evidence

> shall be received and admitted as evidence on such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

18 U.S.C. § 3190.

Oen does not claim that the documents he seeks to exclude were not properly authenticated and certified by the appropriate officials. We have indicated that authentication is the only re-

quirement for admissibility of evidence under general United States extradition law. *Emami*, 834 F.2d at 1451. Thus, Oen's challenges to the reliability and competency of the evidence fail.

Oen argues that the challenged evidence is inadmissible under section 3190 because it would be inadmissible under Hong Kong law. The language of 18 U.S.C. § 3190 requires admission of documents or other evidence "if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused shall have escaped."

We find persuasive the Sixth Circuit's interpretation of section 3190 rejecting a similar contention that evidence must be admissible under the laws of the requesting state. *See O'Brian v. Rozman*, 554 F.2d 780, 783 (6th Cir. 1977). Section 3190 does not on its face require that evidence be admissible in the foreign state. The statute only requires an authentication that would entitle the documents to be "received" for similar purposes in the tribunals of the foreign country. Evidence properly authenticated, proved by a certification of the principal resident United States diplomatic or consular official, "shall be received *and* admitted as evidence" in United States proceedings. 18 U.S.C. § 3190 (emphasis added). Because the evidence in this case was properly authenticated, the district court did not err in refusing to consider the admissibility of the evidence under Hong Kong law.

IV. *Alleged Due Process Violations*

Oen contends that the district court violated his due process rights when it denied his request to cross-examine an individual who submitted an affidavit in support of extradition. However, the Second Circuit has held that there is no right to cross-examination in extradition proceedings. *See Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984); *Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980). We agree with the statement in *Messina* that

> [a]s has been pointed out repeatedly, "[a]n extradition hearing is not the occasion for an adjudication of guilt or innocence." *Melia v. United States*, 667 F.2d 300, 302 (2d Cir. 1981). The evidentiary rules of criminal litigation are not applicable. *Id.*; *Simmons v. Braun*, [627 F.2d 635,] 636

> [(2d Cir. 1980)]; Fed. R. Crim. P. 54(b)(5); Fed. R. Evid. 1101(d)(3). As in the case of a grand jury proceeding, a defendant has no right to cross-examine witnesses or introduce evidence to rebut that of the prosecutor. *Charlton v. Kelly*, 229 U.S. 447, 462 (1913); *see United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976) [(holding no right to cross-examine in grand jury proceedings)].

Messina, 728 F.2d at 80.

Accordingly, Oen was not denied due process by the extradition court's refusal to allow him to cross-examine.

Oen also contends that his due process rights were violated because he allegedly was not adequately informed of the charges against him. A charge in an extradition proceeding should set forth "clearly and briefly the offense charged," but "[i]t need not be drawn with the formal precision of an indictment." *Yordi v. Nolte*, 215 U.S. 227, 230 (1909) (quoting *Ex parte Sternaman*, 77 Fed. Rep. 595, 597 (N.D.N.Y. 1896), *aff'm sub nom. Sternaman v. Peck*, 80 F. 883 (2d Cir. 1897)).

The warrant of arrest was sufficiently clear to apprise Oen of the charges against him; it stated the ordinances Oen was charged with violating, and set forth some of the basic facts supporting the charges. The fact that the ordinances provide for different types of intent (i.e., false accounting with a view to gain for oneself or for another or to cause a loss to another) does not render the charges invalid. *Cf. Kelly v. Griffin*, 241 U.S. 6, 13 (1916) (failing to object to an extradition complaint which charged "perjury, obtaining money by false pretenses, and, co-jointly, stealing or embezzling and unlawfully receiving money and other property of the King which had been embezzled, stolen or fraudulently obtained by means of a conspiracy. . . ."). Thus, the government did not violate Oen's due process rights by giving him the notice it did.

Oen also contends he was denied due process in his extradition proceeding because the extradition court denied his motion for discovery. Although there is no explicit statutory basis for ordering discovery in extradition proceedings, the extradition court has

the inherent power to order such discovery procedures as law and justice require. *See Quinn*, 783 F.2d at 817 n.41. In exercising its discretion to grant or deny discovery, an extradition court should consider that " 'extradition proceedings are not to be converted into a dress rehearsal for trial' and 'whether the resolution of the contested issue would be appreciably advanced by the requested discovery.' " *Emami*, 834 F.2d at 1452 (quoting *Quinn*, 783 F.2d at 817 n.41).

The extradition court did not abuse its discretion in denying Oen's discovery motion. Oen has made no showing that the requested discovery would appreciably advance his negation or explanation of the government's showing of probable cause.

V. *Probable Cause*

Oen contends that there is insufficient evidence to establish probable cause to extradite him. In an extradition proceeding, this court reviews the evidence to determine "whether there was any evidence warranting the finding that there was a reasonable ground to believe the accused guilty." *See Theron*, 832 F.2d at 495. Thus, Oen's appeal on this issue must fail if there is "*any* evidence of probable cause." *Id.* at 501 (quoting *Artukovic v. Rison*, 784 F.2d 1354, 1355-56 (9th Cir. 1986)) (emphasis in original). The Supplementary Treaty defines probable cause as "whether there is sufficient evidence to warrant a man of reasonable caution in the belief that . . . an offense has been committed by the accused." Supplementary Treaty, Article II.

To establish probable cause under the false accounting charges, the record must contain evidence that the loans were false, that Oen knew they were false, and that he intended to gain for himself or for another. *See* Hong Kong Theft Ordinance § 19(1)(a). The affirmation of the accountant who investigated Union Bank provides adequate evidence that the loans were false. In addition, the district court could infer from the record that Oen knew the loans were false. Several affiants stated that all Union Bank's Indonesian loans were Oen's responsibility. In addition, Oen apparently knew of irregularities regarding these loans, representing a departure from normal banking procedure. Finally, Oen was responsible for receiving the money from the false loans,

which was then used to make payments in an allegedly fraudulent offshore deposit scheme. The fact that Oen controlled the Indonesian loans and the offshore deposit accounts, coupled with the evidence that these loans differed in several important respects from normal bank loans, raises an inference that Oen knew the loans were false. Although there is no direct evidence of Oen's intent, his intent to produce a gain for himself and the Bank, or for another company, may be inferred from the structure and result of the transactions. Thus, there is evidence to support a reasonable belief that Oen committed the offense of false accounting.

To establish probable cause that Oen published a false statement, the evidence must show that Oen was a corporate officer who published or concurred in publishing a material statement that is or may be misleading, false, or deceptive, and that he did so with the intent to deceive members or creditors of the corporation. *See* Hong Kong Theft Ordinance § 21(1). There was sufficient evidence to establish probable cause that Oen engaged in publishing a false statement. First, Oen is an officer of the bank. Second, Oen concurred in publishing a statement of the bank's assets which included the false loans. Finally, Oen's intent to publish a false statement may be inferred from the resulting gain to himself and the bank.

VI. *Recusal*

Oen argues that because the same judge presided over both the extradition and the habeas proceedings, Oen was denied meaningful review. The precise issue of whether an extradition judge must recuse in habeas proceedings is an issue of first impression in this circuit. The two other circuits which have addressed this issue, however, have held that a judge who presides over an extradition hearing need not recuse and may hear a habeas corpus action. *See Demjanjuk v. Petrovsky,* 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); *David v. Attorney General,* 699 F.2d 411, 416-17 (7th Cir.), *cert. denied,* 464 U.S. 832 (1983).

This court adopts the holdings of those circuits. Federal district judges are frequently called upon to reconsider prior rulings without recusing themselves. *See Withrow v. Larkin,* 421 U.S. 35,

57 (1975) (having the same judge retry a case after reversal does not violate due process); Fed. R. Civ. P. 59 (new trial); Fed. R. Civ. P. 60 (relief from judgment or order); Fed. R. Crim. P. 35 (reduction or correction of sentence). Allowing the extradition judge to review his actions in the context of a habeas proceeding both avoids review by one district judge of the actions of another district judge, and promotes judicial economy because the extradition judge is familiar with the facts and circumstances surrounding the extradition request. Thus, the district court did not err in refusing to recuse itself from reviewing as habeas court its decision of extraditability.

The judgment is AFFIRMED.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF YIN-CHOY OEN } CR-87-32 MISC RHS

Transcript of Proceedings
Friday, August 7, 1987

Before: The Honorable Robert H. Schnacke, Judge

* * *

The Court: . . . [p. 8] I find one other contention of the defense to [p. 9] be of merit, and that is with respect to the translations.

At least some of these documents were originally in Chinese. The normal method of presenting documents to be translated—that require translation is to produce them in the original and then have a translation.

While I am not saying that is the only way in which it can be done, the defense is certainly entitled to see the original and to compare the original to the translation and to verify the translation.

The defense has made a fairly strong case that there are, obviously, areas of I won't say incompetent translation, but translation that raises substantial question about the competency of the translator.

Now, in the cases where the officers interrogated someone—bilingual officers interrogated a witness who spoke only Chinese and put down in answers the English equivalent of what they understood the witness to say, I would think in proper circumstances that could be accepted as appropriate evidence, but not on the signature of the Chinese-speaking witness.

We have English documents signed by Chinese witnesses who concededly could not speak or read or understand English. Now, to me that is a totally meaningless document.

If the officer who took the testimony provides a declaration to the effect reciting what he has done and indicated—indicating if he is—we can sufficiently rely upon [p. 10] his competency to do it in that fashion if he says "these are the product of my inquires [sic] of this witness which he gave me in Chinese and which I wrote down in English and I'm competent to do that," I would think, even though no original Chinese transcript of that conversation is available, I could accept the officer's declaration to the effect that that did occur and that information was provided.

It is not the best way to do it, but it is certainly a reasonable way to get such testimony. We don't have that.

And with respect to the documents that have been translated, I think there is no doubt of the fact that the defense is entitled to see, prior to a determination here, the original of those documents and to test the translations. As I say, the case they have made for that is pretty strong.

* * *

[p. 11] The Court: Well, are there affirmations that were originally in the Chinese language?

Mr. Chao: As to all the nine affirmations that are referred to in our motion, it is my understanding from their response that there is nothing in Chinese. All they have is a translator's version of testimony, which we find to be totally inadmissible.

* * *

[p. 12] The Court: I would say this, if I had the affirmation of the accountant and if I had the affirmation of the officers who took the testimony of the Chinese-speaking witnesses reciting those facts that I have indicated heretofore, I would [p. 13] find the showing sufficient to establish probable cause.

The fact that some day Hong Kong may be subject to some laws other than the laws it is subject to now strikes me as dealing in speculation, and I don't think that is a basis for thinking that

this case could some day be punished by the death penalty. I think that is reaching pretty far.

Mr. Chao: I would be prepared to address that.

The Court: It is an ingenious argument and a fascinating one, but not one that is persuasive.

Mr. Chao: I would be prepared to address that at the hearing, I guess, on the 17th.

If I could address the nine affirmations which your Honor has raised. I think even if—the government has admitted they do not have any original Chinese version of those nine witness's [sic] testimony. All they have is a translation, an English translation. Places are incoherent. The grammar is incorrect. The syntax is incorrect. It doesn't make sense in other places.

It would have been relatively easy for the government to have done it correctly, i.e., to have the witness prepare an affidavit in Chinese, then prepare an English translation and then it—we would have, the defense would have had its right, its ability, to test the accuracy. Or alternatively, they could have recorded by tape recording process—

The Court: I realize there are many things they could [p. 14] have done. We are dealing with what they did do.

I am finding that that is not an unreasonable presentation here, provided it is adequately supported by declarations to show that it was done and by someone competent to do it.

Mr. Chao: If your Honor is permitting the government to supplement its submission with an affidavit from the translating officer, will it be open to the defense to, upon examining such affidavit, to submit further briefing to your Honor as to that adequacy? I don't know what they are going to put—

The Court: I don't know either. I'm assuming they are going to be adequate affidavits. And if some items are not adequately covered, we will have to consider whether they create a sufficient gap in the proof to interfere with the extradition.

I am inclined to doubt—well, I won't speculate about that. In any event, those two contentions by the defense are accepted, and to that extent the defense motions are granted.

The remaining contentions I think are not supported by the law, and the remaining motions will be denied.

* * *

[p. 18] CERTIFICATE OF REPORTER

I, Roberta L. Rogers, official reporter, for the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, do hereby certify that the foregoing transcript, pages numbered 2 through 17, inclusive, constitutes a true, full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

_____

Roberta L. Rogers, CSR

APPENDIX H

[Filed August 14, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF: OEN YIN-CHOY	Criminal No.: CR 87-0082-MISC-RHS ORDER RE OEN YIN-CHOY'S PRE-HEARING MOTIONS

OEN YIN CHOY submitted six pre-hearing motions in these extradition proceedings. These motions came on regularly for hearing before this Court on August 7, 1987. Having considered the documents, memoranda, and argument presented by counsel for the parties and GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that:

1. OEN YIN-CHOY's motion to strike and exclude Grimsdick's Affirmation and Accountants' Report is denied in part and taken under submission in part. The Grimsdick Affirmation will be admitted into evidence. The Accountants' Report does not appear to comply with the requirement of Article VII(5) of the United States-United Kingdom Extradition Treaty that evidence be given on oath or affirmed. Therefore, pursuant to Article IX(2) of the United States-United Kingdom Extradition Treaty, the Hong Kong government must submit an affirmation from John Michael Henley Grimsdick sufficient to meet the requirement of Article VII(5) of the Treaty in regard to the Accountants' Report. Such further affirmation must be filed with the Court and served upon Mr. OEN's counsel no later than 12:00 noon, August 17, 1987.

2. OEN YIN-CHOY's Motion to Produce Cantonese Originals of Government Affirmations or, in the Alternative, to Exclude English Translations is also taken under submission. On the basis of the memoranda filed by the parties with regard to this issue, a question has arisen as to whether the English only affirmations submitted by certain witnesses, who apparently do

not speak English, have been given "under oath or affirmation" as required by Article VII(5) of the Treaty. Therefore, pursuant to the provisions of Article IX(2) of the Extradition Treaty, the Court is hereby requiring the government of Hong Kong to provide declarations from Hong Kong officers and officials explaining why Cantonese original translations were not submitted with the Extradition Request and describing the circumstances leading to the submission of English only affirmations by witnesses Or Mui- chu, Yueng Yun-tong, Lee Yue-wing, Lee King-mo, Lai Kwo- pui, Tsang Fung-kwan, Chung Lin-shing, Wong Mui, and Liu Shih-kun. Such affirmations must be filed with the Court and served upon Mr. OEN's counsel no later than 12:00 noon, August 17, 1987.

3. OEN YIN-CHOY's remaining four motions, the Motion to Strike and Exclude Evidence, the Motion to Strike and Exclude Affirmation of Lulu Yui, the Motion to Dismiss Request for Extradition for Failure Adequately to Inform Oen Yin-choy of the Charges Against Him, and the Motion for Discovery, are denied.

4. The hearing on plaintiff's request for extradition, previously scheduled for August 17, 1987, is hereby rescheduled for August 31, 1987 at 10:00 a.m.

5. Upon stipulation of counsel, Mr. Oen may file and serve his Opening Memorandum setting forth any argument resulting from the government's further submission no later than the close of business, August 21, 1987; the government may file and serve any response thereto no later than the close of business, August 26, 1987; and Mr. OEN may file and serve any reply thereto no later than the close of business, August 28, 1987.

IT IS SO ORDERED.

DATED: Aug 14, 1987

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge
for the Northern District of
California

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF YIN-CHOY OEN } CR-87-82 MISC RHS

Transcript of Proceedings
Monday, August 31, 1987

Before: The Honorable Robert H. Schnacke, Judge

* * *

[p. 2] Mr. Chao: Yes, please, your Honor. If I could take up the translation motion first.

At the last time we were here, your Honor, the Court ruled that Mr. Oen is entitled to the Chinese originals of the statements of the ten witnesses at issue here.

The Court also said that the ten translations in English provided to the Court were totally meaningless documents. I believe those are the words of the Court.

The Court: Without adequate support.

Mr. Chao: Based on the understanding, or at least certainly my understanding, that there was nothing in Chinese, the Court provided the government the opportunity to submit supplemental affidavits to explain the procedures whereby they arrived at the ten translations which are submitted to the Court.

[p. 3] These supplemental submissions to the Court, however, revealed that, in fact, each of the ten witnesses at issue there are original written Chinese statements. That admission by itself, your Honor, warrants the production of those original Chinese statements. We thought they did not exist. In fact, they do exist. And given the Court's—

The Court: What do you understand those statements to be?

Mr Chao: I understand those to be the statements written in Chinese.

The Court: By whom?

Mr. Chao: By—I guess they were written by either the agent or the witnesses themselves. But I understand they were subscribed to, reviewed by the witnesses themselves. So they were adopted by the witness. And those are the source documents for the ten translations which are before your Honor. Those are the documents that we are entitled to compare against the ten translations before the Court.

The Court: Are there such documents, Mr. Swenson?

Mr. Swenson: No, there is not, your Honor. I'm not sure how we could make it any clearer. It was like any criminal investigation, there were people interviewed as part of that investigation. And what Mr. Chao is calling original Chinese versions, there were original Chinese statements made from the first time these various witnesses were interviewed. The [p. 4] English translations were made of those for the other police officers and the prosecutors.

Those statements were taken having nothing to do with this extradition request. They were purely a part of the initial investigation.

And as the affirmation of Mr. Ip and Ms. Yui indicate that there was a process that was followed from that arriving at the English affirmations that were submitted with the extradition request.

And those English affirmations—there is no comparable Chinese original of that particular statement because what was initially put down in Chinese was subsequently added to as the investigation continued and new information became available.

So we submit our position has been consistent throughout and that the only thing that was any different was that these original Chinese statements—we never claimed there weren't such things. There just weren't any exact translations of what was submitted with the extradition request.

The Court: I guess there is no doubt of the fact that they will be—they would be under the American system producible as initial statements made by the witnesses or parties.

Mr. Swenson: Jencks act type material.

The Court: But they are not—they are not the precise basis for the declarations or affidavits that we have here.

Mr. Swenson: That's correct.

[p. 5] Mr. Chao: I would like to, if I could, point your Honor to the government's own affidavit from Lulu Yui. This is at page 4 of her supplemental affirmation. She says as follows:

"All these witnesses had by March 1987 provided statements in the Chinese language."

She goes on to say that the statements had been translated—

The Court: She does not say written statements.

Mr. Chao: I understand those are written. And if I am incorrect in that, I assume I will be corrected by the government. She goes on to say that these statements had been translated into the English language—

The Court: Statements do not mean written statements unless it says written statements. Do you have some evidence that they are written statements?

Mr. Chao: I understand they are. Are they?

Mr. Swenson: The initial, the very first interview, was a written statement in Chinese that the—

The Court: First of all, is everybody stipulating that all of the witnesses read and write Chinese?

Mr. Swenson: They do all read and write Chinese, that's correct, the ones in question here.

Mr. Chao: I have no basis to know one way or the other, but I presume so.

If I could go the next sentence further, your Honor, to [p. 6] show that the basis—Ms. Yui said that all affirmations of the

witnesses in the case were prepared in the English language and were to be based, as necessary, on the English translations of the Chinese statements that the witnesses had previously provided.

That shows, I submit, that the translations before this Court are derived from those original Chinese statements, which the English—

The Court: There are other affidavits that indicate that that isn't always so; that there have been alterations, corrections, amendments, changes. As the investigation developed, they culminated in a final affidavit.

Mr. Chao: But if there were—

The Court: Do we have the declaration of a person who says under oath, "I talked to the witness. The witness explained to me what happened in Chinese. I put it down in English. I translated the English that I had put down into Chinese. The witness affirmed that that was so. And what we have presented to the Court on my oath are the Chinese statements of the witness translated into English"?

Mr. Chao: We do not, your Honor. With respect to only one of the ten witnesses has there been any affirmation from the government even approaching what your Honor has stated. As to the other nine of the ten witnesses, there was no such statement saying, "I am in a position to know that what is in the English [p. 7] translations before the Court accurately and truthfully represents, you know, paragraph by paragraph, what the statement—what the witness had originally testified to either in the interview process or what have you.

The Court: There is an indication that at some point somebody else was observed or heard to be reading something to a witness and the witness agreed that in signing it that it seemed all right to the witness.

Mr. Chao: I think there was, if I understand—

The Court: I have no way of knowing that the witness had any idea what the witness was signing at that point, either from

the witness' affidavit or from the affidavit of the person who took the signature.

Mr. Chao: I think your Honor is correct, we do not have any basis to know. And in fact, these witnesses—there is no way a witness who does not read English can attest to the English translation before the Court or attest to—

The Court: The translator has to attest to that. As I understand it, the translator has not done that.

Mr. Chao: There is a magistrate—a translator to assist the magistrate. And they in conclusory form say—

The Court: I have a strong suspicion that everything that ought to have been done was done, because it seems pretty clear that everybody was being very careful.

But it does not seem to me to have been—unless I have [p. 8] missed something—to be described as having been done. And that's what disturbs me.

I can't put my finger on anything that convinces me by the oath of any witness that the witness in signing the English document had reason to know at that point what that document said in a fashion that he could understand.

Now, maybe I am wrong about that. But that's my present view.

Mr. Conyngham: I wonder if I could possibly—

The Court: Sure.

Mr. Chao: I think your Honor is correct in that.

The Court: Counsel is going to point out what I have missed.

Mr. Conyngham: Your Honor, the affidavits from the Chinese language officer, Choi Chow Wai-Chung states at paragraph 4 that "on the dates listed thereunder at central magistracy, Hong Kong, I truly and fully translated to the following persons from English into Cantonese their respective affirmations/affidavits in these proceedings," and she lists the ten witnesses.

The Court: They were not signed at that time.

Mr. Conyngham: No, your Honor, they weren't.

Then if we go to the additional affidavit now from the magistrate's interpreter, Mr. Poon Chui-Keung, he says at paragraph 4:

> [p. 9] "I well and truly orally translated from English into Cantonese and from Cantonese into English, as appropriate, to the best of my skill and understanding the following conversations between the magistrate Warner Bernard Greville Banks and each of the affirmants named in paragraph 3. Warner Bernard Greville Banks asked each affirmant whether their name, address and occupation was as stated in the affirmation."

They quite clearly were talking about that witness' affirmation at that time. Whether the said affirmation had previously been translated for them from the English language to the Cantonese language and whether they solemnly and sincerely—

The Court: Let's say you are presented with a document in Lithuanian and you have seen a document that looks something like that before, and the magistrates says, "is this the document that was translated to you?" How do you know? How do you know that it is the same document?

Here is a document pulled out of a file in a strange language presented to a witness who doesn't understand the language. It is not translated, except insofar as the name and address is concerned, apparently. Does that document have the oath or affirmation of the translator on it?

Mr. Conyngham: The interpreter, court interpreter, [p. 10] identifies which ones—which affidavits he was talking about. He lists the same ten witnesses.

The Court: Is that correct?

Mr. Conyngham: Yes. At paragraph 30:

> "The first and second days of April '87, I was acting in my capacity referred to in paragraph 1 of this affirmation and was present when the persons listed hereunder made their affirmations."

And he lists the same ten witnesses over that two day period.

The Court: You have got the same people there—

Mr. Conyngham: But, your Honor, there is also—

The Court: Do you have the same affirmations there?

Mr. Conyngham: Well, your Honor, I agree you may rely on good faith. There was also the evidence from Chief Inspector Ip that the bank's staff—and there was about four bank staff out of these ten people—did speak and read some English. They were just basically more comfortable in Cantonese.

I would have thought it would have been reasonable to suppose that as bank staff and senior bank staff, these people—they could identify their names, their addresses in English.

Hong Kong is an international banking community. A lot of banking has to be done in English. Clearly they could not operate in that capacity without having some basic [p. 11] understanding.

Mr. Chao: To address that, your Honor, we are talking about, for example, in Mr. Lee Yue-Wing case, a 35-page affidavit and in Mr. Or's case, a 27-page affidavit. If they are not completely comfortable in English—if they were completely comfortable in English, they would have presumably done that—

The Court: We know that affidavit was translated for him.

Mr. Chao: We don't know whether it was accurately translated. As your Honor has held, we have the right under the case law that we have cited earlier to compare the originals against what is submitted to the Court for accuracy.

And I submit that given the government's admission that in fact the original Chinese statements have discrepancies with respect to the translations before the Court—

The Court: There is no Chinese statement, as I understand it. They were simply investigator's notes. And they are not what is presented to this Court as support for an extradition authorization.

Mr. Chao: I would point the Court—

The Court: I look upon those as irrelevant.

Mr. Conyngham: Your Honor, this does happen—

The Court: The only question in my mind— First of all, let me say for my own purposes I am completely satisfied [p.12] that the affidavits or declarations are in fact those of the persons whom they purport to be taken of; that they are satisfactorily translated.

But that is, in large part, possibly because I am accepting the bona fides of everybody connected with the case. And it rather appears as if they did everything that appeared to them appropriate to present these things in a proper fashion.

What we have missing here, if anything, is a careful adherance [sic] to what we might call the chain of evidence in the United States, and the documents don't get properly identified at each step of the procedure.

But it does appear that reasonable steps were taken to ascertain that the documentation was accurate; that everything that bears upon that was reviewed [sic] by the magistrate by competent translators; that it was not put together simply by the police department. And that we have here, I think, are affidavits of the kind that sufficiently comply with the requirements of the treaty to be acceptable in support of the application for extradition.

The gaps are not serious ones. They don't go to the foundation admissibility of these documents. And I'm satisfied that they can be received. So with respect to those declarations, the motion will be denied.

Mr. Chao: Your Honor, would your Honor permit me to examine inspector Lulu Yui, who was [sic] submitted a declaration in [p. 13] support of this translation motion?

Mr. Swenson: We would strongly object to that. We would object to that.

Mr. Chao: She is present in court today. She presented her examination—testimony on direct examination, and it is no great inconvenience to the government for me to cross-examine her.

Mr. Swenson: We believe it is, your Honor. It is attempting to offer contradictory evidence, which is not—

The Court: I don't think he is trying to contradict any evidence. He is trying to establish whether or not there is any evidence. I suppose that's appropriate. What is she going to say?

Mr. Chao: I don't know what she is going to say.

The Court: If you don't know what she is going to say, you shouldn't be putting her on the witness stand.

Mr. Chao: I would like to put her on the witness stand and go over her declaration that she submitted to the Court to go into the interview procedures, to go into her note-taking procedure, to examine these witness statements, the original Chinese witness statements, what the basis was and how they were changed.

The Court: I don't think that would be productive.

* * *

[p. 16] The Court: All right. So I will issue the appropriate [p. 17] order for this matter to proceed towards extradition.

Mr. Carlson: Your honor, we would like to address the merits of the extradition at this time. We think there is significant questions regarding probable cause and regarding the other issues that we have raised.

The Court: Probable cause is written all over the case. I don't even think that justifies argument.

Mr. Carlson: Well, your honor, we would appreciate the opportunity to argue the point. We are prepared to do so today. There are 17 volumes—

The Court: I have your written submission on it. It is clear to me that there is probable cause.

Mr. Carlson: Additionally, your Honor, we would like to address the other issues we have raised, the issues about the appropriateness of the treaty, and Mr. Chao is prepared to address that.

The Court: I denied that last time.

Mr. Carlson: That wasn't before the Court last time.

The Court: It was before the Court, the matter of the Chinese takeover.

Mr. Chao: That's correct. I believe your Honor did make comments to the effect—I did not have the opportunity to argue at the time.

The Court: Those matters were all before me. I denied all motions last time, except for these two matters that I said [p. 18] would be left open, and giving the government the opportunity to file further support.

Mr. Carlson: We had not raised those—those were not motions that were on calendar for that day. We did not address them, and would at this time—

The Court: They were all addressed in the papers.

Mr. Carlson: They were addressed in the papers. We would like the opportunity to address them, but of course it is up to your Honor.

The Court: Well, go ahead, briefly.

Mr. Chao: Thank you. I will be—I would like to address first the treaty.

The Court: I have ruled on the government of China takeover in a few years, and that that [sic] does not interfere with the propriety of this extradition. That I will not listen to further argument on.

* * *

[p. 36] CERTIFICATE OF REPORTER

I, Roberta L. Rogers, official reporter, for the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, do hereby certify that the foregoing transcript, pages numbered 2 through 35, inclusive, constitutes a true, full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

/s/ ROBERTA L. ROGERS
Roberta L. Rogers, CSR

APPENDIX J

[Filed Sept. 4, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF: OEN YIN-CHOY A Fugitive from the Crown Colony of Hong Kong.	CR 87-0082-MISC-RHS CERTIFICATION OF EXTRADITABILITY

This matter came on for hearing August 31, 1987, pursuant to Title 18, United States Code, Section 3184, following the provisional arrest of defendant OEN YIN-CHOY upon formal request of the Crown Colony of Hong Kong. A Warrant of Arrest has been issued by the Hong Kong Magistrate's Court, dated February 20, 1987, charging OEN with six counts of the crime of False Accounting, in violation of Section 19(1)(a) of the Hong Kong Theft Ordinance, and one count of Publishing a False Statement, in violation of Section 21(1) of the Hong Kong Theft Ordinance.

The Court, having considered the evidence, including affirmations and supporting documents presented by the United States on behalf of Hong Kong, the many memoranda submitted by both parties, and argument of counsel, finds as follows:

1. Criminal charges are pending against defendant OEN YIN-CHOY alleging the crimes of False Accounting and Publishing a False Statement, violations of the Hong Kong Theft Ordinance. A Warrant of Arrrest, dated February 20, 1987, has issued from the Hong Kong Magistrate's Court. The acts upon which the Hong Kong charges are based are proscribed as felonies by similar criminal provisions of United States federal law;

2. The crimes with which defendant OEN is charged in the Magistrate's Court of Hong Kong are inclued in the provisions of Article III and accompanying schedule of the 1972 Extradition Treaty between the United States of America and the United Kingdom including the Crown Colony of Hong Kong, which Treaty is currently in force;

3. The defendant OEN YIN-CHOY who is before this Court is the same individual charged in the Warrant of Arrest issued by the Hong Kong Magistrate's Court and is the subject of the Request for Extradition by Hong Kong.

4. The evidence before this Court establishes probable cause that defendant OEN committed the crimes alleged in each of the seven counts in the Warrant of Arrest, and the evidence is sufficient, in that probable cause has been established, to sustain the charges for which Hong Kong seeks extradition under the provisions of the 1972 Extradition Treaty between the United States of America and the United Kingdom, including Hong Kong.

For the foregoing reasons, this matter is certified to the Secretary of State, together with a copy of all evidence admitted before this Court, in order that a warrant may issue upon the requisition of the proper authorities of Hong Kong for the surrender of said OEN YIN-CHOY, according to the provisions of the Treaty between the United States of America and the United Kingdom.

IT IS FURTHER ORDERED that the attorney for the United States shall obtain transcripts of all hearings before this Court and shall deliver forthwith the said transcripts of such hearings to the Clerk. The Clerk shall forward to the Secretary of State a copy of this Certification and Order together with transcripts of these hearings and copies of all affirmations and supporting documents received as evidence.

DATED: [undated]

IT IS SO ORDERED.

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge
for the Northern District of
California

APPENDIX K

[Filed Oct. 6, 1987]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

OEN YIN-CHOY,
Petitioner,

vs.

GLEN S. ROBINSON,
United States Marshal
for the Northern
District of California,
Respondent.

C-87-4705-RHS

ORDER

Petitioner's motion to disqualify the undersigned judge pursuant to 28 U.S.C. § 2441 fails to state any grounds sufficient to suggest that this Court's impartiality might reasonably be questioned. Petitioner, with commendable candor, concedes that the only two circuit courts to have considered his contentions have found against them. *David v. Attorney General*, 699 F.2d 411 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983); *Demjanjuk v. Petrovsky*, 612 F. Supp. 571, 575 (N.D. Ohio 1985), 776 F.2d 571 (6th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 1198 (1986).

The motion is denied.

Dated: October 5, 1987

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge

APPENDIX L

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before the Hon. Robert H. Schancke [sic], Judge

OEN YIN-CHOY,
Petitioner,
vs.
GLEN E. [sic] ROBINSON, United States Marshal for the Northern District of California,
Respondent.
C-87-4705-RHS

Transcript of Proceedings
Friday, November 6, 1987

* * *

[p. 6] Mr. Chou [sic]: I would like to address, your Honor, the motion to—it's really the incorrect admission of the ten English translations. This goes to the competence of that [p. 7] evidence. And without that evidence, I don't think there is any question that there wouldn't be any basis for probable cause whatsoever.

I think it's helpful to review the process which the government's own affidavits establish.

The Court: I am aware of the process. The process came about in partial response to my suggestion that there be additional evidence to satisfy this Court that there was a basis for accepting those statements; that they did conform to a reasonable presentation by a person under oath of what had transpired and what had been said.

The ten statements appear to me to be appropriately documented to be the kind of evidence that can be relied upon in an extradition hearing. I am satisfied that they measure up to the treaty requirements.

Mr. Chou: If I could point out to the Court that in the first go-around, the extradition court's observations were correct. This Court observed that, one, the defense is entitled to see the original and to compare the original to the translation and to verify the translation.

The Court: Then we learned that there was no original.

Mr. Chou: In fact, your Honor, the government's own affidavits—Lulu Yui's affidavit establishes that there was—there were original Chinese statements.

The dispute between us and the government was, were [p. 8] those documents the source for the translations which were presented to this Court. In fact, Lulu Yui's affidavit, and I will quote verbatim from her affidavit, establishes that they were the source for translations put forth to this Court.

Miss Yui says at paragraph 6 of her affidavit:

> "I was instructed by Chief Inspector Ip Lau-Chuen that all affirmations of witnesses in the case were to be prepared in the English language and were to be based, as necessary, on the English translations of the Chinese statements that the witnesses had previously provided."

That, your Honor, I submit, shows very clearly that those Chinese written statements, which the government concedes—now concedes exist—were the source documents for the translation.

The Court: This is one part of her declaration.

Mr. Chou: Your Honor also observed at the first go around that an English translation—

(Simultaneous Colloquy)

The Court: I did hope that there was another way of presenting the material. And we discovered later that that was not so.

Mr. Chou: Well, under those—

The Court: I did hold, and I think properly, that what was supplied was acceptable under our rules of evidence as a [p. 9] statement, sworn statement, as to what the witnesses had said.

Mr. Chou: The hole in that, your Honor, is that the witness, the Chinese witness who can't read or right [sic] English who put his name—

(Simultaneous Colloquy)

The Court: We are not relying on the name that the witness put down. We have testimony that the witnesses were interrogated and that this is what the witnesses said. In the circumstances of a witness that can't read or right [sic], that is the best you can do.

Mr. Chou: The problem, your Honor, is that the witness has no way of knowing whether the translator who supposedly translated this English documer ..

(Simultaneous Colloquy)

The Court: We are relying on the oath of the translator, which we do all the time. I am trying a case now in which most of the witnesses speak some obscure Chinese dialect. I don't know whether the witnesses are saying what the translator tells me that the witness is saying.

Mr. Chou: There is case law—

The Court: I have to rely on the translators to tell me that.

Mr. Chou: But there is case—

The Court: That is what we have done here, in effect.

Mr. Chou: Your Honor, there is case law which we have [p. 10] cited in the papers below for two propositions. One is your Honor has so observed the accused does have the right in an extradition proceeding to challenge the accuracy of the translations.

I submit, your Honor, since there is an original Chinese statement— maybe it is not verbatim the same, but that is all the

more reason why it should have been produced. Under those circumstances, I submit, it was error either not to either exclude the English documents or to provide the originals to permit a comparison of one with the other. Then to permit us to—

The Court: We did not rely on the translation of those documents. Those documents were peripheral. What we relied on was the statement, in effect, of the interpreter that these were the assurances and these were the things stated by the witnesses.

Mr. Chou: Well, your Honor, I don't believe it's quite as clear-cut as that. I also believe—we cited the case of Gonzalez versus State that it is error for the trial court not to—in a trial setting not to appoint an unbiased, impartial interpreter for the defendant at trial.

The person who did the translation orally was not an unbiased party. In fact, it was an employee of the government. I think that is another error in going into the translations, your Honor. There was no harm, would have been no harm—

[p. 11] The Court: I find no error there in the acceptance of those ten statements.

Mr. Chou: If I could make one additional point which is related. It goes to the opportunity to cross-examine agent Lulu Yui. She submitted the affidavit, which, as you recall, I just quoted from.

The language in paragraph 6, I submit, shows that these translations were the result of a process which originated with the original Chinese statements.

The government stood up at the extradition hearing and argued, and apparently prevailed upon the extradition court, that, no, it's a different document. These were merely agent's notes.

Well, in fact, I think that's totally undercut by the very words of Lulu Yui's affidavit. And that is one of the key issues we sought to cross-examine Lulu Yui on.

I think that the government's only basis in arguing in this petition for Habeas Corpus for saying it was not error to permit cross-examination of Yui was their statement that Miss Yui was

not a "witness," because she submitted testimony by affidavit as opposed to being called live to the stand.

Frankly, it's hard to respond to, because whether you submit testimony by an affidavit or in person, you are a witness. And the rationale for not allowing cross-examination of affidavit witnesses was not present here.

[p. 12] I understand there is case law which says if there is a witness in Hong Kong, the government will not be forced to fly the witness to the United States to be cross-examined. However, Miss Yui, on her own, had been present in this courtroom at least two times. It would have been no trouble whatsoever to have had her on the stand for half an hour. And there was no reasonable—

The Court: That was never presented to me in those terms during the extradition hearing that she was here and available and that you had subpoenaed her or had her available to put on the witness stand.

Mr. Chou: Well, it's their witness.

The Court: You did make a general request. I was not aware of the fact that she was in the United States.

Mr. Chou: Miss Yui was sitting right here at counsel table, your Honor, and I asked she be cross-examined. And Mr. Cunningham, who was the Hong Kong prosecutor, was also present. It was very clear that Miss Yui was right here in the courtroom.

In fact, your Honor, at first, indicated you would allow her to be cross-examined. You indicated there was no reason not to have her cross-examined.

At that point the government stood up and strenuously objected. Their basis for objecting was that it was contradictory evidence as opposed to explanatory evidence. And [p. 13] I think your Honor at that point correctly observed that, really, the focus of the examination was to go to the competency of the ten translations.

So I believe your Honor is mistaken. She was present in the courtroom.

The Court: I am sure she was, if you tell me she was. I am not sure that that issue was presented to me in that way at that time.

In any event, did I prevent you from calling her?

Mr. Chou: Your Honor, after the objections of government counsel, then reversed your initial inclination and said you would not have her examined. And I believe that I did lay out, and it is in the transcript, I made a proffer of proof of the reasons I wanted to go into. I was at that point arguing from her very own affidavit, making my point on the competency of the ten translations.

Mr. Swenson: If I might clarify that. Mr. Chao was asked what she would testify about. And he said he didn't know. The Court ruled if he didn't know what she was going to testify about, then she can't testify.

Mr. Chou: That is taken out of context. As I said in our reply papers, your Honor, I don't know—I cannot predict what her responses will be. Obviously, if I'm going to cross-examine Lulu Yui, I expect to get admissions out of her to establish my very points on the competency of the translations. [p. 14] It was a truthful answer when I said to your Honor "I do not know what her responses will be." I then went on to say, and made a proffer of proof of the items I intended to examine her on.

I will quote from page 13 of the transcript, line 17 through 22.

> "Mr. Chou: I would like to put her on the witness stand and go over her declaration that she submitted to the Court to go into the interview procedures, to go into her notetaking procedure, to examine these witness statements, the original Chinese witness statements, what the basis was and how they were changed."

As you recall, Miss Yui indicated that as to each of the affirmations or translations that were submitted to the Court, she had altered them. She called it stylistic. She changed a word order. She changed the grammar. She moved subjects and verbs around to make it more coherent.

It has always been our position consistently throughout this motion that that is the type of change of testimony that gives rise to the accused's right to see the original statements. That is—

The Court: Can anyone translate from Mandarin to English without doing that?

Mr. Chou: Sorry?

The Court: Can anyone translate from Chinese to [p. 15] English without doing that?

Mr. Chou: It may be necessary. I do not deny, your Honor, that there may be times when it's necessary to change that, but that gives a right to see the originals.

The Court: The Chinese language, if the statement is that the man went to town, the Chinese use a symbol for man and the symbol for going and the symbol for town, and nothing to indicate whether he went at some earlier time, whether he is on his way right now or whether he intends to go at some time in the future. In any event, there has to be this kind of interpretation by the translator.

Mr. Chou: I am not denying that. What that points out, and as we established with our expert affidavit in support of the motion, the translation process between Chinese and English is one of the most difficult translation processes, much more difficult than, say, French to English. That is why in this case, more than other cases, there was a need to compare the originals against the final, especially where the witness, in the end, had no way of knowing if the final English translation was correct or not.

I don't dispute that there will be changes necessary. But Miss Yui is not a professional translator. The danger is that in being the main case agent is in an interest in seeing whatever the government's ends be achieved, that there is where inaccuracies arise and can creep into the process.

[p. 16] If the translation process was fine, there would be no reason for the government not to provide original statements. And if there were notes associated with the change from the original

statement, the evolution from the original statement to the final English affirmation, there is no reason not to supply those as well.

The Court: All right. . .

* * *

[p. 18] Mr. Chou: As far as Mr. Grimsdick's allegations, we submitted an affidavit from a partner at Arthur Young who in fact is so well respected by the government in Hong Kong that they have used him as an expert witness in their own cases. This Mr. Mace—

The Court: I am sure that will be valuable evidence at the trial, I have no doubt. But we don't take conflicting evidence here.

Mr. Chou: The standard is, your Honor, that if it totally negates probable cause, then that is admissible. And in fact it is admissible. If it totally negates probable cause or obliterates it, which we submit it did, then that is considered explanatory and is properly admissible.

Mr. Grimsdick's conclusions regarding loan falsity lacked a proper commercial or logical basis. Among other [p. 19] things, Mr. Mace noted that the government's banking commissioner named Jonathan Newman, he went to Indonesia. He went to see this borrower, Sinar. He saw them in the flesh. And Sinar, the borrower, explicitly acknowledged the loan. Not only did they acknowledge the loan, they didn't question the loan disbursements. They didn't say the loan was false, and they in fact expressed a desire to repay.

Not only there—

The Court: There is no indication he had any assets to repay it with, of course. It was a false loan because it was not properly identified to the bank, and it was not made known to the bank that the borrower was not going to have any money to pay it back.

Mr. Chou: I believe the Court is mistaken. There is not allegations that the Sinar didn't have any assets to repay.

The Court: No, there is no allegation of that. The allegation was it was a false loan.

Mr. Chou: The problems you are speaking to is a problem of ability to repay on time. That goes to a bad loan, not to a false loan.

The Court: That goes to a false reason if the bank is led to believe something to the contrary. As I say, these are factual disputes that can be raised before the trier of fact. There is certainly evidence before this Court that it was a false loan.

[p. 20] Mr. Chou: Sinar made two repayments on the loan, your Honor. If there was a false loan, that was made with without the borrower's knowledge, why would they make repayments and explicitly acknowledge the loan?

The Court: You have a misconcept of what constitutes a false loan. But go ahead.

* * *

[p. 51] CERTIFICATE OF REPORTER

I, Lawrence J. White, official reporter for the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, do hereby certify that the foregoing transcript pages numbered 2 through 50 constitute a full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled and reduced to typewriting to the best of my ability.

Lawrence J. White, CSR

APPENDIX M

[Filed November 12, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF: OEN YIN-CHOY A Fugitive from the Crown Colony of Hong Kong.	CR 87-0082-MISC-RHS AMENDMENT TO CERTIFICATION OF EXTRADITABILITY

Upon remand of the matter to this Court from the Court considering defendant Oen's petition for a writ of habeas corpus, and upon further review and consideration of the evidence submitted in this matter by the United States on behalf of the Crown Colony of Hong Kong, this Court finds that paragraph 4 of its Certification of Extraditability, dated September 4, 1987, should be amended. Wherefore,

IT IS HEREBY ORDERED that paragraph 4 of the Certification of Extraditability is and shall be stricken and is and shall be replaced by the following:

"4. a. For each of counts one through six in the Warrant of Arrest:

"(1) The evidence before this Court established probable cause that defendant Oen committed the crime defined in Section 19(1)(a) of the Hong Kong Theft Ordinance of false accounting "with a view to gain for himself or another," and the evidence is sufficient, in that probable cause has been established, to sustain extradition on the charges of false accounting with a view to gain for himself or another under the provisions of the 1972 Extradition Treaty between the United States of America and the United Kingdom, including Hong Kong.

"(2) The evidence before this Court did not establish probable cause that defendant Oen committed the crime defined in Section 19(1)(a) of the Hong Kong Theft Ordinance of false accounting "with intent to cause loss to

another," and the evidence is insufficient, in that probable cause has not been established, to sustain extradition on charges of false accounting with intent to cause loss to another under the provisions of the 1972 Extradition Treaty between the United States of America and the United Kingdom, including Hong Kong.

"b. For count seven in the Warrant of Arrest, the evidence before this Court established probable cause that defendant Oen committed the crime defined in Section 21(1) of the Hong Kong Theft Ordinance of Publishing a False Statement, and the evidence is sufficient, in that probable cause has been established, to sustain extradition on that charge under the provisions of the 1972 Extradition Treaty between the United States of America and the United Kingdom, including Hong Kong."

DATED: Nov. 12, 1987

IT IS SO ORDERED.

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District
Judge
for the Northern District of
California

APPENDIX N

[Filed Nov. 13, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OEN YIN-CHOY,
Petitioner,

v.

GLEN E. ROBINSON,
United States Marshal
for the Northern
District of California,
Respondent.

Civil No.:
C 87-4705-RHS

ORDER

On November 6, 1987, a hearing was held in this Court on a petition for a Writ of Habeas Corpus filed by Petitioner Oen on September 10, 1987. This petition had been filed as a result of a Certification of Extraditability issued by this Court on September 4, 1987, in *In The Matter of The Extradition of OEN YIN-CHOY*, CR 87-0082-MISC-RHS, in which this Court had issued a Certification of Extraditability based on a request for extradition by the Crown Colony of Hong Kong.

During the course of the hearing on the petition for habeas corpus, this Court remanded to the extradition court one issue raised in the petition regarding the charges to which the Court should find extraditability proper. Since this same Court heard the initial request for extradition, this Court amended the initial Certification of Extraditability, as specified in the Amendment to Certification of Extraditability issued November 12, 1987 in CR 87-0082-MISC-RHS.

Based on all the papers filed by the parties to this proceeding, as well as the oral arguments made at the hearing on November 6, 1987;

IT IS HEREBY ORDERED that OEN YIN-CHOY's petition for a Writ of Habeas Corpus is hereby dismissed.

DATED: Nov. 13, 1987

IT IS SO ORDERED.

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge

APPENDIX O

[Filed December 7, 1988]

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OEN YIN-CHOY, Petitioner-Appellant, v. GLEN S. ROBINSON, U.S. Marshal for the Northern District of California, Respondent-Appellee.	No. 87-15055 [D.C. # CV-87-4705-RHS (Northern District of California) ORDER

Before: TANG, SCHROEDER, and NELSON, Circuit Judges.

The petitioner's motion to file the addendum to the petition for rehearing is granted.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The stay previously entered is vacated.

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 12, 1988]

OEN YIN-CHOY,
Petitioner-Appellant,
vs.
GLEN S. ROBINSON,
U.S. Marshal
for the Northern
District of California,
Respondent-Appellee.

No. 87-15055
DC# CV 87-4705-RHS
Northern California
ORDER

Before: TANG and SCHROEDER, Circuit Judges

The appellant's motion for stay of extradition pending the filing and resolution of a petition for a writ of certiorari is granted.

APPENDIX Q

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 28, 1988]

OEN YIN-CHOY,
Petitioner-Appellant,
vs.
GLEN S. ROBINSON,
U.S. Marshal
for the Northern
District of California,
Respondent-Appellee.

No. 87-15055
DC# CV 87-4705-RHS
Northern California
ORDER

Before: SCHROEDER, Circuit Judge

The appellant's motion for a clarification of the orders of December 7, 1988, and December 12, 1988, is granted.

This court's order of December 7, 1988, which granted the appellant's motion to file an Addendum to the petition for rehearing, also served to permit the filing of the appellant's Supplemental Addendum to the petition for rehearing.

This court's order of December 12, 1988, served to stay the mandate in accordance with the provisions of Fed. R. App. P. 41(b).

APPENDIX R

[Filed July 17, 1987]

CEDRIC C. CHAO
MICHAEL M. CARLSON
THOMAS P. REILLY
MORRISON & FOERSTER
California Center
345 California Street
San Francisco, California 94104
Telephone: (415) 434-7000

Attorneys for Defendant
OEN YIN-CHOY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF OEN YIN-CHOY	No. CR-87-82-MISC-RHS DECLARATION OF ELLEN LAI-SHAN YEUNG IN SUPPORT OF OEN'S MOTION FOR CANTONESE ORIGINALS OF GOVERNMENT AFFIRMATIONS Date: August 17, 1987 Time: 10:30 a.m. Court: Hon. Robert H. Schnacke

I, ELLEN LAI-SHAN YEUNG, declare as follows:

QUALIFICATIONS

1. I was born in Hong Kong and my primary language is Cantonese Chinese. I am also fluent in English and Mandarin Chinese.

2. I received my Master of Arts in Chinese language and literature from San Francisco State University in 1981, where I was the recipient of the School of Humanties' Graduate Student Award. I am completing a Doctorate in Chinese Literature in the

Department of Asian Languages and Literature of Stanford University, Stanford, California (estimated date of completion summer 1989). I received my Bachelor of Arts from San Francisco State University, where I majored in English and minored in Chinese. I have a California secondary school teaching credential in English and Chinese and a California Community College teaching credential in Chinese.

3. My translation experience includes translating scripts for Cantonese simulcasts of television programs and video projects and translating position papers on Chinatown Rezoning for the San Francisco City Planning Department. I have also served as an expert witness in Chinese language translation in a civil case concerning a fraudulent will, and was retained as an expert consultant by the San Mateo County District Attorney's Office in relation to the criminal trial concerning the murder of Henry Liu.

4. I have taught Chinese language at the graduate level at Stanford University, Stanford, California since 1984. Prior to 1984, I taught advanced Chinese language and Chinese literature at the undergraduate and graduate levels at San Francisco State University from 1981-1983. I have also taught English as a Second Language and Conversational Mandarin Chinese in the San Francisco Community College District from 1980 to the present. From September 1977 to July 1980, I developed a set of curricula for teaching English as a Second Language to adults as the result of a project sponsored by the California State Department of Education and the Chinatown Resources Development Center.

5. I have translated numerous long pieces both from English to Chinese and from Chinese to English. A partial list of my published translations is included on my curriculum vitae, which is attached as Exhibit A to this declaration.

PROBLEMS IN CANTONESE/ENGLISH TRANSLATION

6. Based on my education and my experience as a translator from Cantonese to English and from English to Cantonese, I can state that it is often difficult to express the same ideas precisely

when translating from one of these languages to the other. A serious potential for ambiguity and inaccuracy always exists, relating in part to the translator's qualifications and expertise, and in part to his or her cultural background, personal experiences and potential biases.

7. Some Chinese concepts are absent in English and vice versa, causing native speakers of the two languages to conceptualize ideas somewhat differently. A good translator will try to convey a "foreign" concept with one that he himself considers to be an equivalent in his native culture; however, the resultant translation may be clumsy or may sacrifice some precision of meaning. Further, in such situations, two different translators may easily arrive at two different shades of meaning in translating the same concept. The translator's subjectivity and discretion always create a serious potential for error, especially in translation between languages as different as Chinese and English.

8. A concept or expression in one language may sound alien to a listener who speaks the second language because the two languages' structure and grammar differ. For example, the Chinese often use strings of adjectives to convey emphasis or nuance. If translated literally into English, these strings of adjectives would sound strange and repetitive. Although the adjectives mean something similar to each other, they do not always mean the same thing. In translating this sort of sentence into English, a translator will often try to eliminate the redundancy. Thus, she must choose the single English adjective that best approximates the sense of the long adjectival compound, although such an arbitrary choice is necessarily subjective and approximate.

9. Chinese and English word order often differs. Word order frequently conveys crucial information about what part of the sentence is most important to the speaker. This is especially true in Chinese where the object can be placed at the beginning of the sentence for emphasis. Further, another Chinese linguistic device allows the speaker to stress the time, place or manner of a verb, rather than its action. In making an idiomatic English translation, the translator may lose these subtleties of emphasis.

10. A related translation problem is the optional use of conjunctions in Chinese. For instance, the simple Chinese sentence "ta bu qu, wo ye bu qu" (literally, "he not go, I also not go") can be interpreted in three ways because of the absence of a conjunction: (a) "Neither he nor I will go;" (b) "If he won't go, then I won't go either; or (c) "Since he is not going, then I won't go either." The translator will base her decision on how she perceives the context, which necessarily varies between translators and always provides the potential for inaccuracy.

11. The Chinese language, unlike English, is a non-inflected language. Thus, there are few tenses in Chinese and no cases or number associated with the verb. So "I", "me," and "mine" may all be translated by the same word in Chinese. Likewise, the Chinese forms for such English verbs as "instructed," "had instructed," "used to instruct," "instruct," "am instructing," and "will instruct," may be identical. This creates a significant potential for ambiguity in translation. In addition, the inflected quality of English may force a translator to specify a verb form or tense where the Chinese speaker did not. The resultant choice may misrepresent the Chinese speaker's intended meaning.

12. Similarly, because Chinese is uninflected, Chinese nouns frequently do not differentiate singular and plural. Thus, the same Chinese word could be translated as "loan," "the loan," "a loan," "loans," "the loans," or "some loans." The translator must choose only one of these options, based on her preception of the context.

13. Pronouns are used sparingly in idiomatic Chinese. Thus, a Chinese speaker may express a series of actions without specifying the identity of the actor or the person acted upon. As a result, in an account of a conversation, it may be difficult to discern who is said to be speaking and to whom. An apparent example of this phenomenon occurs in the Affirmation of Lee Yue-wing at ¶ 31, Volume 3 at page 447:

> From the commencement of the acceptance of off-shore fixed deposits, staff of the accounts department amongst whom was a TAM Yuk-tsim, in November each year would at weekly meetings with branches instruct them not to say

anything to Coopers and Lybrand, the auditors regarding off-shore fixed deposits. [sic]

In this example, it is unclear whether Tam Yuk-tsim is giving the instructions, or whether someone else on the accounts department staff is giving these instructions, or whether someone else is giving instructions *to* the accounts department staff. The same affirmation, ¶ 39, Volume 3 at page 451 states: "I was instructed by OEN Yin-Choy to take charge of the current accounts of C.V. NASA and PTUCC, and as I have stated instructed that all off-shore deposits received by branches were to be deposited into these two accounts." Again, the identity of the person who gave instructions about the off-shore deposits is unclear. Generally, when translating such a sentence into English, a good translator is bound by English grammatical forms to put in a subject and an object. However, this gives the translator a great deal of influence over the meaning and creates a potential for serious inaccuracies.

SPECIAL DIFFICULTIES IN ORAL TRANSLATION

14. Mistakes of translation naturally increase during oral translation. The quicker the translator's response time, the more potential there is for error. A translator who is expected to translate on the spot without time for reflection is more likely to make mistakes, since there is no time to reflect on the accuracy of the translation. In my experience, the potential for inconsistencies within the translation greatly increases under such conditions. For example, inconsistent English terms may be used to translate the same Chinese word or a variety of nuances in Chinese may be rendered into a single English word or phrase. Thus, the exact circumstances and the degree of stress under which a translator works may seriously affect the accuracy of the translation.

15. Furthermore, because of an historical divergence between the written and spoken language, some Cantonese words cannot be written down. This phenomenon presents special problems to any translator trying to reconstruct or review a witness's oral statement from written Cantonese notes.

TRANSLATION PROBLEMS IN THE AFFIRMATIONS PROVIDED BY THE HONG KONG GOVERNMENT

16. I have reviewed some of the affirmations of Cantonese speakers offered in English in this case. Since I do not have access to the witness's testimony in Cantonese, I am unable to comment on the overall accuracy of the translations or how accurately specific sentences in English convey the intended meaning of the Cantonese-speaking witnesses.

17. However, the English translations provided contain many examples of errors commonly made in translating from Cantonese to English. For example, the Affirmation of Yeung Yun-tong states, at ¶ 2, Volume 4 at page 972: "During the periods that Oen Yin-choy as he was not in Hong Kong [sic], no one called for board [sic] of Directors' Meetings." This sentence contains a literal translation of a common Cantonese grammatical construction, resulting in a garbled English sentence. This also appears to be the case in the Affirmation of Lee Yue-wing at ¶ 19, Volume 3, page 442: "However, I can remember no specific instance when I saw Paul Li on telex instructions [sic] in respect of the loans made to Indonesian customers from July 1984." This evidence suggests to me that the testimony was originally given orally in Cantonese. Other sentences simply contain grammatical or syntactical errors, some of which result in ambiguity, such as: "In general terms I did not receive any instructions from Oen about the Indonesian loans because I do not speak much English and would have trouble with the name [sic]." (Affirmation of Lee Yue-wing, ¶ 14, Volume 3 at page 439.)

18. The quality of the English translation varies greatly. Some passages are rendered in smooth, idiomatic English, while others are plagued with obvious errors in basic English grammar and syntax. Further, the grammatical and syntactical mistakes are not consistent throughout. This suggests more than one "translator" was involved in drafting these affidavits. It appears that the original Cantonese to English translation was done hastily and/or by someone whose command of English was only fair. The English documents then appear to have been revised by a second person more fluent in English, possibly without reference to the

original Cantonese tapes, if any. Obviously, such a method would tend to further distort the original testimony.

19. My review of the affidavits and the mistakes noted above lead me to conclude that at least one of the translators of these affirmations is not competently fluent in English and that there may be more serious inaccuracies in these translations as a result. Such inaccuracies could only be revealed by a close comparison between the witnesses' affirmations as rendered in English and their original testimony in Cantonese or the translator's Cantonese version of the testimony.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on July 16, 1987.

/s/ ELLEN LAI-SHAN YEUNG
Ellen Lai-shan Yeung

EXHIBIT A

CURRICULUM VITAE

NAME: Ellen Lai-shan Yeung
ADDRESS:
TELEPHONE:

EDUCATION BACKGROUND

Doctor of Philosophy..... (in progress)	Stanford University Major: Chinese Literature
Master of Arts ..... (1981)	San Francisco State University Major: Chinese Language & Literature (recipient of Graduate Student Award, School of Humanities)
Bachelor of Arts ..... (1975)	San Francisco State University Major: English, Minor: Chinese
Credentials	Calif. Community College Instructor Subject: Chinese Calif. Secondary School Teacher Subjects: English & Chinese

TEACHING EXPERIENCE

Stanford University 1984-present	advanced Chinese language (reading & writing)
San Francisco State..... 1981-1983	advanced Chinese language, undergrad & grad Chinese literature
S.F. Community College District 1980-present	ESL, citizenship and conversational Mandarin
S.F. Unified School..... 1976-1977	English and social science

CURRICULUM DEVELOPMENT

Sept. 77-July 80.....	Developed three semesters of prevocational ESL curriculum for new adult immigrants. This three-year project was funded by the State Department of Education and sponsored by the Chinatown Resources Development Center. (See also Publications section)

Summer 74..... Developed an intermediate-level reader for junior high students as a project for an EPDA Chinese Bilingual Ed workshop sponsored by San Francisco State University. This reader has been used in Marina and Benjamin Jr. High.

TRANSLATION EXPERIENCE

1. Translated scripts for Cantonese simulcasts of television programs and video projects

2. Translated position papers on Chinatown Rezoning for the S.F. City Planning Department

3. Acted as Chinese language expert in civil and criminal cases, checking for accuracy of translations used in court testimony

RELEVANT VOLUNTEER ACTIVITIES

1. Was newscaster and coordinator of a one-hour bilingual radio program ("Chinese Community Hour") on KQED-FM from 1970-1984

2. Was interpreter and mistress-of-ceremony at lectures, workshops and community events sponsored by the Chinese Culture Center of San Francisco from 1980-1986

3. Was editor of the bilingual membership letter for the Chinese Culture Center during 1983

PUBLICATIONS

Language Curriculum

1. *English That Works*, Scott Foresman & Co.: Glenview, Illinois, 1982 (co-authors: L. Savage & M. How, referred to in the Curriculum Development section)

Translations

English to Chinese:

1. *Qianjin (Thousand Pieces of Gold)*, by Ruthanne L. McCunn, *East-West:* San Francisco, California, 1983

2. *Pie-biter*, by Ruthanne L. McCunn, Design Enterprises: San Francisco, Calif., 1983

Chinese to English:

1. "The Field of Life and Death" by Xiao Hong, in *The Field of Life and Death and Tales of Hulan River*, Indiana University Press: Bloomington, Indiana, 1979 (co-translator: Howard Goldblatt)

2. "Dawn on the River" by Jun Qing, in *Literature of the People's Republic of China*, ed. by Kai-yu Hsu, Indiana University Press: Bloomington, Indiana, 1980

3. "Opening Address to the Third Congress of the Chinese Writers Association" by Liu Baiyu, in *Chinese Literature for the 1980s (The Fourth Congress of Writers & Artists)*, ed. by Howard Goldblatt, M.E. Sharpe Inc.: Armonk, N.Y., 1982

4. "A Bundle of Letters" by Bai Hua, in *Stubborn Weeds—Popular & Controversial Chinese Literature After the Cultural Revolution*, ed. by Perry Link, Indiana U. Press: Bloomington, Indiana, 1983

5. *The Butcher's Wife* by Li Ang, Northpoint Press: San Francisco, California, 1986 (co-author: H. Goldblatt)

6. "The Way of the Beast" by Sha Ding, in *Furrows*, ed. by Helen Siu, Stanford University Press: Stanford, Calif., forthcoming

APPENDIX S

[Filed August 17, 1987]

CEDRIC C. CHAO
MICHAEL M. CARLSON
THOMAS P. REILLY
MORRISON & FOERSTER
California Center
345 California Street
San Francisco, California 94104-2105
Telephone: (415) 434-7000

Attorneys for Defendant
OEN YIN-CHOY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF	No. CR-87-82-MISC-RHS SECOND AFFIDAVIT OF DAVID WILLIAM MACE
OEN YIN-CHOY	Date: August 17, 1987 Time: 10:30 a.m. Court: Hon. Robert H. Schnacke

To all to whom these presents shall come:

I, Hon-Che Yeung Notary Public, duly authorised and sworn, residing and practising in Hong Kong

Do hereby certify that on the 3rd day of August 1987 at Suite 934-936, Swire House, No. 11 Chater Road, Hong Kong before me the Affidavit of Mr. David William Mace annexed hereto was duly executed by Mr. David William Mace and that the name subscribed thereto is of the proper hand writing of the said Mr. David William Mace.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, this 3rd day of August One thousand nine hundred and eighty-seven.

/s/ Hon-Che Yeung
Notary Public, Hong Kong.

[Seal]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF:	Criminal No.: CR 87-82-MISC-RHS
OEN YIN-CHOY	AFFIDAVIT OF DAVID WILLIAM MACE

I, David William Mace of 26th Floor, Great Eagle Centre, 23 Harbour Road, Hong Kong, Chartered Accountant make oath and say as follows:—

1. I am a Fellow of the New Zealand Society of Accountants, having qualified as a chartered accountant in New Zealand in 1964. I am also a Fellow of the Hong Kong Society of Accountants, and a Fellow of the Institute of Chartered Secretaries.

2. I am a partner in the firm of Arthur Young, Certified Public Accountants, of 25-27 Floors, Great Eagle Centre, 23 Harbour Road, Wanchai, Hong Kong. Arthur Young has gained an international reputation in the field of public accountancy and audit, with experience in all aspects of commercial activity. I first came to work for Arthur Young in Hong Kong in October 1983 on a secondment basis when, as a senior insolvency partner of the New Zealand practice, I was asked to assist in the conduct of a major liquidation assignment in Hong Kong. Subsequently I joined the Hong Kong office of Arthur Young on a permanent basis on 1 April 1985.

3. Since I became a qualified accountant in 1964, I have gained experience in the operations and methods of a wide variety of local and international organisations.

4. I am now a partner in Arthur Young in its corporate services department, being mainly responsible for investigation, insolvency and liquidation work.

5. I have read and examined the 14 volumes of documents ("the record") produced by the Hong Kong Government in support of the request for the extradition of OEN Yin Choy from the United States of America to Hong Kong allegedly in respect

of 6 offences contrary to Section 19(1)(a) of the Theft Ordinance Cap.210 of the Laws of Hong Kong, and an offence contrary to Section 21(1) of the said Theft Ordinance. In particular I have read and examined the affirmation of one John Michael Henley Grimsdick ("the Grimsdick Affirmation") and the attached document entitled "Union Bank Investigation Report on Certain Indonesian Loans granted by Union Bank in 1984" ("the Accountants' Report").

6. In expressing the conclusions to which I depose below in paragraphs 8 and 9, I am relying and commenting on the record and have not examined any other evidence. I do not express any view on the substance of the transactions as any such view would require a complete analysis of all the documents underlying them, many of which are not in the record and have not been available to me at this time.

7. The Grimsdick Affirmation and the Accountants' Report both describe an investigation conducted by the accounting firm of Ernst & Whinney regarding six loans made by Union Bank in 1984. The Grimsdick Affirmation and the Accountants' Report conclude that these six loans were falsely recorded and falsely accounted for. These conclusions were inferred by Mr. Grimsdick principally from his "findings" that the funds were not directly disbursed to the recorded borrowers, that such funds were disbursed to other parties, and that such disbursement was "unnecessarily complex". He opined that if Union Bank had actually intended to make payments to the recorded borrowers then a more direct method of payment would have been used. (Accountants' Report Vol.2 at 384-385)

8. In my experience, there are numerous legitimate commercial loans in which the proceeds are not paid directly to the borrower. Accordingly, it simply does not follow that a loan is false because the proceeds are not directly received by the borrower. Also, it is not unusual to have complex disbursement patterns, and it is unreasonable to conclude that a loan is false because of such complex disbursement patterns. Lastly, to say that were the loans not false a more direct payment method would have been used simply does not follow, since indirect and complex payment methods are not unusual.

9. In fact, the record demonstrates that all of the borrowers with whom Mr. Newman talked acknowledged the loans and indicated their desire to repay or renegotiate the loans. For example, when Mr. Newman (Affidavit of Jonathan Peter Newman Vol. 4 at 1092-93) states that he met Mr. Susanto, a representative of P.T. Sinar Tangerang Steel and the spokesman for the loan account in the name of his wife, Mrs. Hariani Ngadamin, Mr. Susanto "expressed the desire to repay the bank, but that he was unable to do so at present" (Vol.4 at 1092). Mr. Susanto was prepared to sell assets to repay the Bank (Vol.4 at 1093).

Similarly, when Mr. Newman met Mr. Sutato Muyono, a General Manager representing the owner of P.T. United Roxy Crown, the latter acknowledged the loan by asking for "three years more to pay" the bank (Vol.4 at 1094). When Mr. Newman met Mr. Salim, a representative of F.A. Gaya Setia Baru, the two discussed "the possibility of renegotiating the loan outstandings . . ." (Vol.4 at 1095).

Clearly, the foregoing discussions are not the responses of persons who are not the borrowers. In the light of them, Mr. Grimsdick's conclusions summarized at paragraph 7 above, lack a proper commercial (or logical) basis.

SWORN at 936, Swire House
Chater Road, Central, Hong Kong /s/ D.W. MACE
this 3rd day of August 1987

Before me,

/s/ HON-CHE YEUNG
Hon-Che Yeung
Notary Public
Hong Kong

APPENDIX T

[Filed July 18, 1987]

CEDRIC C. CHAO
MICHAEL M. CARLSON
THOMAS P. REILLY
MORRISON & FOERSTER
California Center
345 California Street
San Francisco, California 94104
Telephone: (415) 434-7000

Attorneys for Defendant
OEN YIN-CHOY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

	No. CR-87-82-MISC-RHS
IN THE MATTER OF THE EXTRADITION OF	DECLARATION OF PROFESSOR HUNGDAH CHIU IN OPPOSITION TO EXTRADITION REQUEST
OEN YIN-CHOY	Date: August 17, 1987 Time: 10:30 a.m. Court: Hon. Robert H. Schnacke

I, PROFESSOR HUNGDAH CHIU, declare as follows:

QUALIFICATIONS

1. I am a Professor of Law at the University of Maryland School of Law, a position I have held since 1977. At the University of Maryland School of Law, I teach or have taught courses or seminars on the following subjects: Legal Developments of Mainland China (this course had been renamed "Chinese Law"); Soviet, Chinese and Western Approaches to International Law; Public International Law; International Trade Law; and International Transactions. I have been in charge of the East Asian Legal Studies Program of the University of Maryland School of Law since 1977. Previously (1966-1970), I participated in teaching Chinese Attitudes Toward International Law, as well

as Soviet, Chinese and Western Approaches to International Law at Harvard Law School. In 1980, I taught a course on Government and Politics of China at the University of Virginia.

2. I was born in Shanghai, China in 1936. I was educated in schools in Mainland China and Taiwan. In 1958, I graduated from National Taiwan University with an LL.B. degree. In 1960, I moved to the United States and continued my legal studies in this country. In 1962, I graduated from Harvard Law School with an LL.M. degree, and in 1965 I was awarded the S.J.D. (Doctor of Juridical Science) degree from Harvard Law School. Between 1965 and 1974, I held various teaching and research positions at Harvard, at the National Taiwan University and National Chengchi University. Since 1974, I have been on the faculty at the University of Maryland School of Law. In the summer of 1979 I was a Fellow at the Institute for Sino-Soviet Studies at George Washington University in Washington, D.C., and in the fall of 1980 I was a part-time Visiting Professor of Government and Foreign Affairs at the University of Virginia, teaching a course on the Government and Politics of China there.

3. I am a member of numerous professional associations and scholarly organizations, including the American Association for Chinese Studies, of which I am presently the president and a member of the board of directors; the American Society of International Law, of which I served as a member of the panel on China and International Order between 1969 and 1973; the Association for Asian Studies, of which I was a member of the Committee on Asian Law between 1976 and 1979; the International Law Association, of which I served as an observer to the Third United Nations Conference on the Law of the Sea between 1976 and 1982; and the British Institute of International and Comparative Law.

4. I have written, edited, and contributed to numerous scholarly publications relating to International Law, Chinese politics and legal systems, and the Hong Kong question. My works in English concerning China's legal system, constitution and politics, and the Hong Kong issue, include the following:

Articles

(a) "The Judicial System Under the New PRC Constitution," in *The New Constitution of Communist China: Comparative Analyses,* Taipei: Institute of International Relations, 1976, pp. 63-121.

(b) "Criminal Punishment in Mainland China: A Study of Some Yunnan Province Documents," 68 *Journal of Criminal Law & Criminology* 374-398 (1977).

(c) "Certain Problems in Recent Law Reform in the People's Republic of China," in 3 *Comparative Law Yearbook, 1979* at 1-33 (Leyden: A.W. Sijthoff, 1980).

(d) "China's New Legal System," 79 *Current History*, No. 458, at 29-32, 44 (September 1980).

(e) "Structural Changes in the Organization and Operation of China's Criminal Justice System," 7 *Review of Socialist Law*, 53-72 (1981).

(f) "Socialist Legalism: Reform and Continuity in Post-Mao People's Republic of China," *Mainland China's Modernization: Its Prospects and Problems*, published by the Institute of International Studies, and Institute of East Asian Studies, University of California at Berkeley (1981), pp. 62-92. (A slightly revised version also published in 17 *Issues & Studies*, No. 11 (Nov. 1981), pp. 47-75, and *Occasional Papers/Reprint Series in Contemporary Asian Studies*, No. 1-1982 (46)).

(g) "Chinese Law and Justice: Trends Over Three Decades," University of Maryland School of Law, *Occasional Papers/Reprint Series in Contemporary Asian Studies*, No. 7-1982 (52), 34 pp.

(h) "The Chinese Constitution and the Rule of Law," 11 *Review of Socialist Law*, No. 2, at 143-160 (1985).

(i) "China's Legal Reforms," 84 *Current History*, No. 503, at 268-271, 275-276 (September 1985).

(j) "The 1984 Sino-British Settlement on Hong Kong: Problems and Analysis," 2 *Journal of Chinese Studies*, No. 3, at 95-111 (April 1985).

(k) "The 1984 Sino-British Agreement on Hong Kong and Its Implication on China's Unification," 21 *Issues & Studies*, No. 4, at 13-22 (April 1985).

Books

(l) Co-Author, *People's China and International Law: A Documentary Study*, 2 Volumes (with J.A. Cohen, Harvard Law School), Princeton, New Jersey: Princeton University Press, 1974, 1790 pp. (Awarded a Certificate of Merit by the American Society of International Law in 1976.)

(m) Co-author, *Criminal Justice in Post-Mao China*, Albany, N.Y.: State University of New York Press, 1985, 300 pp.

(n) Co-editor and contributor, *China: 70 Years After the 1911 Hsin-hai Revolution*, Charlottesville, Virginia: University press of Virginia 1984, 601 pp.

(o) Editor and contributor, *Symposium on Hong Kong; 1997*, Occasional papers/Reprints Series in Contemporary Asian Studies, 1985-3 (68). 99 pp. Index.

(p) Co-editor and contributor, *The Future of Hong Kong: Toward 1997 and Beyond*, New York, Westport (Conn.) and London: Quorum Books, The Greenwood Press, June 1987. 262 pp. Index.

5. Chinese is my native language, and I can read, write, and speak Mandarin Chinese fluently. I am also fully fluent in the English language. I maintain a library of Chinese language political and legal publications from the People's Republic of China which I use in my scholarly and professional endeavors.

6. I am familiar with the People's Republic of China's legal system, constitution and politics, including the status of individuals under the PRC regime. On October 10, 1985, I was invited by the Subcommittee on Human Rights and International Organiza-

tions and the Subcommittee on Asian and Pacific Affairs of the U.S. House of Representatives to testify at the Hearing on Human Rights and Political Developments in the People's Republic of China.

THE STATUS OF HONG KONG

7. Britain established control over Hong Kong in three stages: (1) China ceded the island of Hong Kong to Britain "in perpetuity" after being defeated in the 1839-42 "Opium War." Treaty of Nanking, August 29, 1842, United Kingdom-China, 93 *Consolidated Treaty Series*, at 467, art. 3. (2) China further ceded an approximately 3½ square mile area at the southern tip of the Kowloon Peninsula to Britain in perpetuity after being defeated in the 1850-60 "Arrow War." Convention of Friendship between China and Great Britain, October 24, 1860, 123 *Consolidated Treaty Series*, at 73-74, art. 6. (3) In 1898, China was compelled to lease to Britain an additional 365 square miles, including the rest of the Kowloon Peninsula. Convention between China and Great Britain respecting an Extension of Hong Kong Territory, June 9, 1898, 186 *Consolidated Treaty Series*, at 310-311. This territory, referred to as the "New Territories," includes the greater part of the territory administered by Hong Kong's colonial government.

8. Since the establishment of the People's Republic of China (the "PRC") in 1949, China has consistently maintained that these 19th century treaties were "unequal" instruments, obtained by force, and hence illegal, null and void. Consequently, China has insisted that it, and not Britain, possesses sovereignty over Hong Kong. Britain has insisted, however, that the treaties are valid and that Hong Kong Island and the Kowloon Peninsula are legally British territory.

9. China's position, that it maintains full sovereign rights over all of Hong Kong and that Britain's presence is temporary and illegal, has been consistent and public. On March 10, 1972, China sent a letter to the United Nations General Assembly's Special Committee on Colonialism, demanding that the Committee drop Hong Kong from its list of colonies subject to international

oversight on the ground that "Hong Kong . . . [is] part of Chinese territory occupied by the British . . . authorities. The settlement of the question of Hong Kong . . . is entirely within China's sovereign right and does not fall at all under the ordinary category of colonial territories." "China Makes Claim in UN to Hong Kong, Macao," *International Herald Tribune* (Paris), March 11-12, 1972, p. 1; *reprinted in* J.A. Cohen and H. Chiu, 1 *People's China and International Law: A Documentary Study*, 384 (1974). (*See* Exh. 1, appended hereto) A September 26, 1983 article in *Beijing Review*, a publication generally regarded by scholars as reflective of official PRC policy, stated that

> [a]ll the three treaties were the product of unlawful acts; they were all concluded by Britain's use or threat of force; their contents constitute serious encrouchments upon China's sovereignty and territorial integrity and violations of the peremptory norms of international law. Therefore . . . these treaties should be considered null and void.

Jin Fu, "China's Recovery of Xianggang (Hong Kong) Area Fully Accords With International Law," 26 *Beijing Review*, No. 39 (September 26, 1983), p. 16. (Exh. 2 hereto)

10. Beginning in 1982, Britain and China therefore began negotiations over the return of Hong Kong to China in 1997. These negotiations produced, in 1984, a Sino-British "Joint Declaration . . . on the Question of Hong Kong." Instruments of ratification were duly exchanged on May 27, 1985. *Facts on File, 1985*, vol. 45, No. 2323 (May 31, 1985) p. 412. (*Facts on File*, p. 412, and the text of the Joint Declaration are appended as Exh. 3 hereto.)

11. The Joint Declaration provides that control over Hong Kong will pass from Britain to China on July 1, 1997. Under the terms of the Joint Declaration, Hong Kong's economic system and lifestyle are to remain unchanged for 50 years after 1997. Individual rights will, the document promises, be respected by the post-1997 Hong Kong government, which is to "enjoy a high degree of autonomy" from PRC authorities, except in foreign and defense affairs. Joint Declaration, Para. 3(2).

12. The Joint Declaration does not, however, resolve the issue of sovereignty over pre-1997 Hong Kong. Rather, it finesses the issue. Paragraph 1 provides that the PRC "has decided to *resume the exercise of sovereignty* over Hong Kong with effect from 1 July 1997." (emphasis added.) This wording is consistent with China's view that it never lost *sovereignty* over the territory, but merely the ability to exercise what already existed. Thus, the Joint Declaration does not contradict China's persistent assertion that Hong Kong is, was, and will be Chinese territory, over which China may, at such time as it sees fit, reassert pre-existing sovereign rights.

UNCERTAINTIES REGARDING THE CRIMINAL JUSTICE SYSTEM AS A RESULT OF THE 1997 TRANSITION

13. The Sino-British Joint Declaration sets out a general framework for the transition from British to Chinese administration of Hong Kong, but it provides few specifics. This is of particular concern in the criminal justice area because China and Britain have such different concepts and procedures governing state treatment of accused and incarcerated criminals.

14. The Joint Declaration provides that China will embody and expand the Declaration's basic policies in a Basic Law, which is currently being drafted. A first draft of the Basic Law will not be issued until 1988, and passage by China's National People's Congress is not expected until 1990. Thus, there is at present no way to be certain what legal provisions will govern Hong Kong prisoners who pass into China's control in 1997. Preliminary indications suggest that the committee drafting the Basic Law will not address this issue. See "Structure of Hong Kong Basic Law," *reprinted in The Future of Hong Kong: Toward 1997 and Beyond*, at 237-241, H. Chiu, Y.C. Jao and Y.L. Wu, eds. (1987) (Exh. 4 hereto) (adopted by the Second Session of the Basic Law Drafting Committee in Beijing, on April 22, 1986). On April 16, 1987, Chinese leader Deng Xiaoping told members of the Basic Law Drafting Committee: "[T]he Basic Law of the Hong Kong Special Administrative Region should not be written in great detail. I am afraid that the Hong Kong system should not

completely copy Western systems." "Deng Xiaoping Discusses 'One Country, Two Systems'," *Foreign Broadcast Information Service, China*, April 17, 1987, p. W3 (Exh. 5 hereto). In view of this statement, it seems unlikely that the Basic Law will deal with the prisoners question. If it does not, then China will be free to decide what to do with Hong Kong prisoners sentenced before 1997 when China "resumes" its exercise of sovereignty in Hong Kong.

15. Even if the prisoners question is dealt with in the Basic Law, relegation of this issue to the Basic Law instead of the Sino-British Declaration could have important consequences for Hong Kong prisoners who pass into China's control in 1997. The Joint Declaration is an international obligation between China and Britain. Any violation of its terms could result in diplomatic protest or other action by the British government. The Basic Law, in contrast, will simply be a statute passed by China's National People's Congress. According to Article 67, paragraph 4 of the PRC Constitution, the Standing Committee of the National People's Congress is empowered to interpret and amend statutes. (Exh. 6 hereto) Amendment or interpretation of the Basic Law in a subject area as to which the Joint Declaration is silent would give Britain almost no grounds to protest or intervene.

16. A third possible avenue for settling the prisoners issue might be in the Sino-British Joint Liaison Group, which will be charged with considering "procedures . . . for the smooth transition in 1997." Joint Declaration, Annex II, para. 5. (Exh. 3 hereto) Whether the Joint Liaison Group will in fact work out an arrangement on prisoners is, however, a question which cannot be definitively answered now.

17. In addition, the rights and freedoms promised in the Joint Declaration, even if fully set forth in a future Basic Law of Hong Kong, are subject to Chinese interpretation. If Britain were to disagree with China's interpretation, it could raise objections only through negotiation or other modes of peaceful settlement agreeable to the Chinese. This is because the Joint Declaration contains no mechanism for arbitration or judicial settlement. The PRC is well-known to disfavor third party adjudication in the settlement of its international disputes. *See* Liu Fengming,

Xiandai Guojifa Gangyao (Outline of Modern International Law) at 159-160 (1982). (Exh. 7 hereto) For example, China has neither submitted to adjudication before the International Court of Justice nor accepted the compulsory jurisdiction of that court.

18. Although the Joint Declaration promises autonomy, certain provisions of China's constitution suggest that such autonomy may be quite limited. Local laws may be amended by the Standing Committee of the National People's Congress, under its Article 67, paragraph 4 power "to interpret statutes," if they are found to conflict with the laws of the central government. (Exh. 6) Paragraph 8 of the same article says that the Standing Committee has the power

> to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations . . . (Exh. 6 hereto)

Similarly, the State Council, according to Article 89, para. 14 of the Constitution, has the power "to alter or annul inappropriate decisions and orders issued by local organs of state administration at different levels." (Exh. 6 hereto) Moreover, on June 8, 1987, the Basic Law Drafting Committee reached a consensus that "any laws on defense and foreign affairs and those related to the realization of China's national unity and territorial integrity are not within the scope of the high degree of autonomy given to Hong Kong." The Drafting Committee has not yet defined the clause "realization of national unity and territorial integrity." "Basic Law Body Agrees on Application of PRC Laws," *Foreign Broadcast Information Service, China,* June 9, 1987, p. W2. (Exh. 8 hereto) Therefore, certain PRC laws will be applied to Hong Kong in the post-1997 period. At present, the PRC has not specified which laws these will be. Recent statements by Chinese leader Deng Xiaoping suggest that post-1997 Hong Kong's "high degree of autonomy" is subject to China's "benevolent intervention" if China decides that intervention would be in the best interest of Hong Kong people:

> Don't think everything will be just fine once all Hong Kong affairs are administered by the Hong Kong people, and the central authorities will have nothing to look after. Such an idea is unrealistic. It is true that the central authorities will not interfere in the special administrative region's specific work. The central authorities need not interfere. However, if in Hong Kong something to the detriment of the country's fundamental interest or harmful to Hong Kong's own fundamental interests happens, can Beijing then refrain from interfering? If the central authorities gave up all rights, chaos might occur, which would harm Hong Kong's interests. Therefore, to retain some powers of the central authorities will be beneficial rather than harmful in Hong Kong.

"Deng Xiaoping Discusses 'One Country, Two Systems'," *Foreign Broadcast Information Service, China,* April 17, 1987, p. W3 (Exh. 5 hereto).

THE QUESTION OF CHINESE JURISDICTION OVER CRIMES COMMITTED IN HONG KONG

19. After 1997, it will be undisputed that, as a matter of international law, the Chinese government may exercise jurisdiction over any offenses committed within its territory, including Hong Kong. Several sections of the Joint Declaration suggest that China will delegate this jurisdiction to local Hong Kong authorities. Part III of Annex 1 provides that the "judicial system previously practised in Hong Kong shall be maintained, except for those changes consequent upon the vesting in [Hong Kong] courts . . . of the power of final adjudication" and that a "prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference." (Exh. 3 hereto)

20. There is, however, no provision to exclude Chinese exercise of *criminal* jurisdiction in Hong Kong. Presumably, this question will be dealt with in the Basic Law. As explained above, however, the legal structure of the transition does not foreclose the possibility that China could reinterpret or revise the Basic Law. Thus, at present, there is no way to be certain that China

will not exercise its valid jurisdiction over criminal matters in Hong Kong.

21. Moreover, under Chinese law the PRC could assert jurisdiction over crimes which occurred before 1997. According to the PRC's consistently expressed position, Hong Kong has always been part of China's territory and subject to its sovereignty. *See* paragraph 9, *supra*. China did not renounce this position in the Joint Declaration. *See* paragraph 12, *supra*. Thus, according to Chinese legal principles, China now has jurisdiction over crimes committed in Hong Kong. The fact that China has not exercised this jurisdiction does not mean, any more than allowing Britain to administer the territory meant, that it will not assert its rights "at an appropriate time." *See* paragraph 12, *supra*.

22. An alternative basis for jurisdiction over pre-1997 criminals exists in statutes which apply Chinese law to actions outside China which affect the PRC or its citizens. Article 6 of the Chinese Criminal Law provides:

> [The Chinese Criminal Law] may be applicable to foreigners who, outside the territory of the People's Republic of China, commit crimes against the state of the People's Republic of China or against its citizens, provided that this Law stipulates a minimum sentence of not less than a three-year fixed term of imprisonment for such crimes; but an exception is to be made if a crime is not punishable according to the law of the place where it was committed. (Exh. 9 hereto)

In addition, Article 3, paragraph 3 of the Criminal Law provides that "when either the act or consequences of a crime takes place within the territory of the People's Republic of China, a crime is to be deemed to have been committed within the territory of the People's Republic of China." (Exh. 9 hereto) Thus, even if the Basic Law, when drafted, provides for exclusion of Chinese criminal jurisdiction over crimes committed in Hong Kong, if China considers the crime to have affected Chinese territory other than Hong Kong, or Chinese citizens, China can still exercise jurisdiction over that crime.

THE POSSIBILITY FOR RETRIAL AND REMOVAL OF HONG KONG PRISONERS PASSING INTO CHINESE CONTROL IN 1997

23. Should China decide to exercise its criminal jurisdiction described in paragraphs 19-22 above, current PRC law and practice would allow both the retrial of criminal defendants who were tried in Hong Kong before 1997, and the relocation of Hong Kong prisoners to other parts of China.

24. Chinese criminal law and procedure would not inhibit retrial of an already convicted criminal under prevailing Chinese laws.

Article 148 of the Chinese Criminal Procedural Law, for example, allows any citizen to request the court to reopen a decided case for retrial.

> *Article 148.* Parties, victims and their family members or other citizens may present petitions regarding judgments or orders that have already become legally effective to the people's courts or the people's procuratorates, but the execution of such judgments or orders cannot be suspended. (Exh. 9)

Article 149 requires a decided case to be reopened if judicial officers find that the final decision contained errors in the "determination of facts or application of law." (Exh. 9 hereto)

25. The Chinese Criminal Procedure Law prescribes no time limit (such as within 5, 10 or more years) for reopening a decided case for retrial. According to a standard Chinese textbook, "since the establishment of the [People's Republic of China], the people's courts and the people's procuratorates had taken the initiative several times to make overall review or selected review of those judgments which had been entered into force [i.e., final judgments]." *Xingshi Susong Fa Jiaocheng* (Textbook of Criminal Procedure Law), (1982). (Exh. 10 hereto)

26. Popular dissatisfaction about a decided case may cause it to be reopened for a new trial. The following case reported in a Chinese law journal is illustrative:

October 1981	Yu Xiuzhong was sentenced to six years fixed-term imprisonment for committing the offenses of rape and hooligan activities by the Shanghai Intermediate People's Court.
March 1982	Yu was acquitted by the Shanghai Higher People's Court.
March-June 1982	Many people wrote to newspapers and government agencies in charge of political-legal affairs demanding to punish him.
June 1982	Yu was re-arrested by the Public Security Organ (Police).
August 21, 1982	Yu was resentenced to four years fixed-term imprisonment for committing the offense of rape.

(*See* "Maintaining the Dignity of the Socialist Legal System—[Shanghai] Higher People's Court Resentenced Yu Xiuzhong to Four-Year Fixed-Term Imprisonment," *Minzhu Yu Fazhi* (Democracy and Legal System), No. 9, 1982, p. 41. (Exh. 11 hereto)

27. Since 1985, China has published brief summaries of only a small number of court cases in the Gazette of the Supreme People's Court. Prior to 1985, no Court opinions were published officially. Thus, there is no way to know what type of offenses could in fact be retried. Presumably, all types of offenses could be retried.

28. Should China apply these provisions to retry a previously convicted criminal defendant, there is no constitutional prohibition against applying law retroactively. Thus, no legal barrier exists to the *ex post facto* application of PRC law and procedure to pre-1997 Hong Kong crimes.

29. There is also no legal rule barring the removal of Hong Kong prisoners to other parts of China after 1997. While this issue might be dealt with in the Basic Law, the exact provisions of

the Basic Law will not be known until 1990. At present, no law prevents Chinese authorities from moving prisoners around within China. Even if the Basic Law contains special provisions for Hong Kong, China will, as discussed above, have the constitutional authority to change the Basic Law at any time.

30. In sum, ambiguities and lack of specificity in the framework for Hong Kong's transition to Chinese control, and present PRC law, make it impossible to exclude the possibility that a person who is convicted before 1997 and is still imprisoned in Hong Kong after the PRC assumes control over Hong Kong, may be retried under Chinese law or may be sent out of Hong Kong to another location within the PRC for incarceration there.

THE CRIMINAL JUSTICE SYSTEM OF THE PRC

31. The substance and procedure of China's criminal justice system do not comport with Anglo-American notions of fairness and due process. *See generally* S.C. Leng and H. Chiu, *Criminal Justice in Post-Mao China*, State University of New York Press, 1985, pp. 85-122. (Exh. 12A hereto)

32. Judges and judicial officers in the PRC are not independent of political authorities in the sense that American jurisprudence defines judicial independence.

33. Although the 1982 PRC Constitution provides, in Article 126, that "[t]he people's courts exercise, in accordance with the provisions of the law, judicial authority independently and are not subject to interference by administrative organs, public organizations, and individuals," it does not preclude the Communist Party of China from interfering. As a matter of fact, the "judiciary is nominally independent but in practice follows party policy." *Country Reports on Human Rights Practices for 1986*, compiled by U.S. Department of State, February 1987, at 686. (Exh. 12B hereto)

34. One reason for judicial deference to the Communist Party is that judges do not have life tenure. Moreover, no legal training is required for serving as a judge. *See* Article 34 of the 1979 Organic Law of the People's Courts, in R.H. Folsom and

J.H. Minam, *Law in the People's Republic of China: Text, Readings and Materials* 117 (1986). (Exh. 13 hereto) Presidents of higher (provincial), intermediate (administrative region within a province or big city) and basic (county or city) courts are elected or recalled by the People's Congresses of corresponding level for five year terms. Vice-presidents and judges are elected or recalled by the Standing Committees of the People's Congress at the corresponding level for five year terms. *See* Articles 35 and 36 of Organic Law of People's Court. (Exh. 13) Since the Communist Party controls nominations and elections in all the People's Congresses, a judge who disregards the Party's policies runs the risk of being removed or not being nominated for reelection.

35. On paper, the 1979 Chinese Criminal Procedure Law makes a major step toward rule by law, rather than by decree. (See, e.g., Articles 4, 26, 50, 92, 110, 144 in Exh. 9 hereto) In practice, however, procedures are often ignored, and, in any event, Chinese court proceedings do not meet American standards of due process.

36. The 1979 Criminal Procedure Law does not include a fundamental maxim of Anglo-American criminal justice: the presumption of innocence of an accused until he is proved guilty. *Country Reports on Human Rights Practices for 1986,* compiled by U.S. Department of State, February 1987, at 686. (Exh. 12B hereto)

37. Moreover, although various procedural guarantees are provided, Chinese authorities may disregard them with impunity if they find it necessary. The attached excerpts from my testimony submitted to the Hearings on Political Developments and Human Rights in the People's Republic of China, held before the Subcommittee on Human Rights and International Organizations and the Subcommiittee on Asian and Pacific Affairs of the Committee on Foreign Affairs of the U.S. House of Representatives on October 10, 1985, illustrate this point. (*See* Exh. 14 hereto, especially pages 65-67, 71-72) A similar view was expressed in Amnesty International's testimony in the same hearings, submitted by Professor Andrew J. Nathan of Columbia University. (*See* Exh. 14 at 77-83)

38. Because of the differences in criminal procedure between the United States and Britain, on the one hand, and China, on the other hand, a person charged by Chinese authorities for violating Chinese law could be convicted even if, under similar circumstances, the person could not be convicted in the United States or Britain.

39. Persons sentenced to incarceration in PRC prisons serve their terms in institutions about which little information is available outside China. A 1984 Amnesty International report provided information indicating that Chinese prison conditions do not always comport with American standards:

> Although the ill-treatment of prisoners is prohibited by Chinese law, prisoners have been subjected to punishments which constitute ill-treatment according to international standards. Officials have acknowledged that there is a system of punishments—including solitary confinement—for prisoners who break prison rules. Prisoners are sometimes punished harshly just because they are considered "resistant" or because they complain about their treatment, according to former prisoners. This is particularly frequent during detention before trial when prisoners are held in isolation, usually for several months, and repeatedly interrogated, without being allowed to see their family, friends or a legal representative. Amnesty International believes that some of these punishments constitute cruel, inhuman and degrading treatment. They include the use of solitary confinement over the prolonged period; the use of hand shackles—sometimes with the hands tied behind the back—day and night for days or weeks; and other punishments such as beatings or being made to stand without moving for 24 hours without food. Such punishments are also used against convicted prisoners held in prisons or labour camps, although apparently more rarely than in detention centres.

Amnesty International, *China, Violations of Human Rights* 18 (1984). (Exh. 15 hereto)

THE IMPOSITION OF THE DEATH PENALTY IN CHINA FOR ECONOMIC CRIMES

40. The Chinese Criminal Law is drafted in very general terms. Several provisions refer to economic crimes, and, despite vague definitions, specify often harsh sentences. Two articles are listed below to illustrate this point:

> *Article 152.* Whoever . . . steals, swindles or forcibly seizes articles of public or private property of a huge amount is to be sentenced to not less than five years and not more than ten years of fixed-term imprisonment; when the circumstances are especially serious, the sentence is to be not less than ten years of fixed term imprisonment or life imprisonment, and the offender may in addition be sentenced to confiscation of property. (Emphasis added)
>
> *Article 167.* Whoever forges, alters or steals, forcibly seizes or destroys official documents, certificates or seals of state organs, enterprises, institutions or people's organizations is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control or deprivation of rights; when the circumstances are serious, the sentence is to be not less than three years and not more than ten years of fixed term imprisonment.

(Exh. 9 hereto)

41. Economic crimes in China may be punished by death. On March 3, 1982, the Standing Committee of the National People's Congress amended the Chinese Criminal Law so that the death penalty could be imposed on a broader range of crimes, including economic crimes. For example, Article 152 of the Criminal Law was amended as follows:

> (1) With respect to . . . the crime of theft in Article 152 . . . [the] sentencing is . . . supplemented or revised as follows: when the circumstances are particularly serious, the sentence is to be not less than ten years of fixed-term imprisonment, life imprisonment or death, and the offender may in addition be sentenced to confiscation of property.

The Criminal Law and the Criminal Procedure Law of the People's Republic of China, Beijing: Foreign Languages Press, 1984, p. 230. (Exh. 9 hereto)

42. The death penalty has in fact been applied to economic criminals. A worker was executed for stealing 1,600 grams (about 56.5 ounces) of gold and 43,000 grams (about 1,518 ounces) of silver. A female worker was executed for stealing 148 tons of state petroleum. (See Zhang Zhiye, "Handling Crime Strictly According to Law—An Interview with the Vice-President of the Supreme People's Court," *Beijing Review*, Vol. 27, No. 17 (April 23, 1984), p. 20. Exh. 16.) Both cases were apparently handled in accordance with the amended Article 152 of the Chinese Criminal Law.

43. The Chinese criminal justice system rejects the Western principle of *Nulla poena sine lege* (no punishment without a pre-existing prohibitory rule). Therefore, even if charges against a criminal defendant are not directly covered by existing proscriptions, the Chinese authorities can invoke the "analogy provisions" of Article 79 of the Chinese Criminal Law to make the offense punishable. Article 79 provides:

> *Article 79.* A crime that is not expressly stipulated in the Special provisions of this Law may be determined and *punished according to the most closely analogous article* of the Special Provisions of this Law, but the matter shall be submitted to the Supreme People's Court for approval. (Emphasis added)

(Exh. 9 hereto)

44. In my opinion, the Chinese criminal law provision that is most analogous to the Hong Kong crime of false accounting (which I have reviewed) is Article 167.

45. A major crackdown on "lawlessness" was launched in China in 1983. The emphasis was on both violent crime and economic crime. As part of this crackdown on lawlessness, the expanded use of the death penalty resulted in the execution of between 5,000 and 10,000 defendants. *Country Reports for*

Human Rights for 1985, compiled by the U.S. Department of State, February 1986, p. 738. (Exh. 12C hereto)

46. Amnesty International in a 1984 publication discussed the marked increase in the use of the death penalty since the start of the "campaign against crime" in August 1983:

> The death penalty is used extensively in the People's Republic of China. The laws provide for it to be imposed as a punishment for a number of political offences, as well as for ordinary criminal offences. The crimes most often punished by death are murder, rape, and robbery resulting in death or serious injury. However, since 1981 the number of offences carrying the death penalty has doubled, and people can now be executed for a wide range of offences, including theft, bribery, embezzlement, organizing a secret society, molesting women, gang fighting, drug trafficking, pimping or "passing on methods of committing crimes".
>
> Legislation has been adopted on several occasions since 1982 not only to increase the number of offences punishable by death, but also to speed up proceedings in death penalty cases. The procedures for trial, appeal, review of sentence and execution have all been accelerated. Amnesty International expressed its concern in 1981 at the marked increase in the number of death sentences and executions after a decree was adopted which ended the review of all death sentences by the Supreme People's Court. Since then, other changes in legislation have resulted in further increases in the use of the death penalty.

Amnesty International, *China, Violations of Human Rights* 53 (1984). (Exh. 15 hereto)

47. The death penalty has been applied inconsistently in the past by the PRC government. If conditions were to change, for example, if the incidence of economic crimes in Southern China was to increase because of the perceived capitalist influence from Hong Kong, there is the possibility that China may further increase the use of the death penalty for economic crimes. Under such circumstances, the crimes set forth in Article 167 may be encompassed within the scope of the death penalty.

CONCLUDING OBSERVATIONS

48. China has not entered into an extradition treaty with either the United States, nor, to my knowledge, have negotiations begun between the two countries concerning the drafting of such an extradition treaty. *Treaties in Force*, January 1, 1986, compiled by U.S. Department of State, pp. 34-35. (Exh. 17 hereto.)

49. Because of the peculiar features of the Chinese legal system as described above, it is impossible to give definite answers to several vital questions relating to prisoners incarcerated in Hong Kong when China assumes control in 1997, such as whether after 1997 China would retry them or move them to other parts of China.

50. Although China has agreed with the United Kingdom to maintain Hong Kong's capitalist system and life style for 50 years after 1997, there is no credible arrangement to guarantee the implementation of the 1984 Sino-British Joint Declaration.

51. The future of post-1997 Hong Kong will depend on the stability of the Chinese political system, the continuity of current pragmatic policies in the post-Deng Xiaoping period, and the progress of the modernization and economic reform program in China.

52. In the 37 years since the founding of the PRC, the Chinese political system has not been stable. The instability in the political system has led to great swings in the Chinese attitude towards the existence and enforcement of laws. In the 1950's, the Chinese government emphasized the development of the rule of law. In the late 1950's, this policy abruptly changed. Lawyers were branded as "rightists" and persecuted and deemed to be tools of the former bourgeoisie ruling class. By the early 1960's, law had fallen into disfavor, many laws were ignored or repealed, and all law schools were closed. During the Cultural Revolution (1966-1976) the government officially encouraged "lawlessness and the rule of the masses." It is only since approximately 1979 that China has re-emphasized regularity and the rule of law in the resolution of disputes and social problems.

53. Early this year, Deng Xiaoping's heir-apparent, Hu Yaobang, Secretary-General of the Chinese Communist Party, was forced to resign. Gargan, *Leader of Party in China is Ousted for His Mistakes*, The New York Times, January 17, 1987, pp. 1, 4 (Exh. 18 hereto). Who will succeed Deng is now uncertain, and a power struggle is currently underway. *See, e.g.,* Butterfield, *U.S. Sees Setback for China's Plans of Modernization*, The New York Times, January 15, 1987, pp. A1, A11 (Exh. 19); Southerland, *Deng 'Net Loser' in Chinese Turmoil*, The Washington Post, February 7, 1987, pp. A1, A12; (Exh. 20); *China, Battle of the Octogenarians,* Time, March 9, 1987, p. 50 (Exh. 21) and Woodruff, *China replaces young, liberal security chief,* The Sun, April 12, 1987, pp. 1A, 2A. (Exh. 22) How political change in China, either pre- or post-1997, would affect the implementation of the Sino-British Joint Declaration and the treatment of criminal defendants and prisoners present in Hong Kong on July 1, 1997, is a question which cannot be answered in a definite way now.

AUTHENTICATION OF DOCUMENTS

54. I have attached to this declaration as Exhibits 1-22 true and correct copies of the relevant portions of the various documents and articles referred to in the body of my declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Baltimore, Maryland, on July 10, 1987.

/s/ PROFESSOR HUNGDAH CHIU
Professor Hungdah Chiu

/s/ SHIRLEY A. SELIN
Shirley A. Selin, Notary Public

My Commission Expires 7/1/1990

[Exhibits to Prof. Chiu's Affidavit are not reproduced in this Appendix]

APPENDIX U

IN THE MATTER of the Extradition Act 1870-1935 and the bilateral treaty between the United States of America and the United Kingdom

[Seal]

and

IN THE MATTER of a request by the Hong Kong Government for the Extradition of OEN Yin-choy alias James Semaoen alias James Semaun from the United States of America

AFFIRMATION OF LULU YUI

I, Lulu Yui, Woman Senior Inspector of the Commercial Crime Bureau of the Royal Hong Kong Police force, do solemnly and sincerely affirm and say as follows:

1. I am a Woman Senior Inspector with the Royal Hong Kong Police force and I am presently attached to the Commercial Crime Bureau. Since November 1986, I have been the case officer in the investigation conducted by the Commercial Crime Bureau into various offenses contrary to the Theft Ordinance Cap 210 Laws of Hong Kong, suspected to have been committed by OEN Yin-choy alias James Semaoen alias James Semaun in relation to the Union Bank of Hong Kong Limited.

2. On the 2nd of April 1987 at Central Magistracy, Hong Kong, I affirmed an affirmation before Warner Greville Bernard Banks, permanent Magistrate in Hong Kong, for use in proceedings then and now instituted in the District Court for the Northern District of California, whereby the Hong Kong Government is

requesting the extradition of the said OEN Yin-choy to Hong Kong to answer to criminal charges.

3. Further to the said affirmation and further to a request made by the District Court for the Northern District of California, pursuant to Article IX(2) of the Anglo-United States Extradition Treaty, for further information as to the manner in which certain affirmations submitted to the said Court in support of the said extradition request came into being, I now wish to state the following matters:

4. As I have stated in my affirmation dated 2 April 1987, I was the case officer in charge of the Union Bank investigation from November 1986. In my capacity as case officer, I did have to report on a daily basis to my then immediate superior, Chief Inspector Ip Lau-Chuen who was for the period September 1986 to February 1987 the officer in overall charge of the Union Bank investigation. When Chief Inspector Ip was transferred to the Interpol Bureau, Paris, France, in February 1987, I became the officer in overall charge of the Union Bank investigation.

5. I am fluent in both the Cantonese and English languages. I received my primary education at St. Theresa's Primary School, Kowloon, Hong Kong, and my high school education at the Maryknoll Convent School, Kowloon, Hong Kong. I graduated from the latter school at the age of 17. In both these schools all classes, save for classes in which the Chinese language was taught, were conducted in the English language; similarly all examinations, save for examinations in the subject of the Chinese language, were written in the English language. At the age of 17 years I attended York House School, Vancouver, B.C., Canada, where I received an additional one year of high school education. Between the ages of 18 and 22 years I attended the University of Western Ontario; I graduated from that university with a Bachelor of Science degree in Pharmacology and Physiology.

6. In February 1987, Chief Inspector Ip Lau-Chuen instructed Senior Inspector Ellis and myself, amongst other inspectorate rank officers, to prepare affirmations and affidavits for witnesses whose evidence was believed to be relevant to a request that, it was then anticipated, would shortly be made to the United States of America for the extradition of Oen Yin-Choy to Hong Kong. I was to be personally involved in the preparation of the affirmations of the following witnesses:

OR Mui-chu
Yeung Yun-tong
Lee Yue-wing
Ching Hon-kuen
Lee King-mo
Lai Kwo-pui
Tsang Fung-kwan
Chung Lin-shing
Wong Mui
Liu Shih-kun

All these witnesses had by March 1987 provided statements in the Chinese language. These statements had been translated into the English language by either police interpreters or Chinese language officers. I was earlier instructed by Chief Inspector Ip Lau Chuen that all affirmations of witnesses in the case were to be prepared in the English language and were to be based, as necessary, on the English translations of the Chinese statements that the witnesses had previously provided.

7. In the course of preparing affirmations for the above- listed witnesses, further information on the case generally was made available to me as a result of the ongoing police and accountancy investigations. It therefore became necessary to further interview and discuss the case with a number of the above-listed witnesses, prior to compiling their affirmation. These further interviews and discussions were carried out with a view to clarifying, seeking amendments as necessary, or additions to the witnesses' earlier statements. At the time of such further interviews and discussions with the witnesses I made notes of any clarifications, amendments or additions to the earlier statements that the witnesses indicated

they wished to make. When I came to prepare the affirmations or affidavits for these witnesses, I incorporated any such clarifications, amendments or additions that the witness had made into the English affirmation. Thus it is that the contents of the English affirmations of these witnesses are not identical to the English translations of the original Chinese statements taken from these witnesses.

8. In relation to the affirmation signed by Lee Yue-wing, subsequent to his third statement being translated into English, I discussed that statement and its contents with him on three occasions. These discussions led to amendments, clarifications, and additions being made to his final statement. These amendments, clarifications, and additions were then incorporated by me into the English affirmation that he signed on the 1st of April 1987. Prior to Lee Yue-wing signing the affirmation, I made arrangements for the affirmation to be orally translated to him in Cantonese by a Chinese language officer, Choi Chow Wai-Chun. I made arrangements for the affirmation to be handed to the Chinese-language officer well in advance of the time set aside for its oral translation to Lee Yue-wing. I made such arrangements in order that the Chinese language officer would have adequate time to peruse the document and prepare for the oral translation.

9. In relation to the affirmation signed by Or Mui-Chu subsequent to her statement being translated into English on the 7th of February, 1987, I discussed the contents of that statement with her on one occasion. This discussion led to amendments, clarifications, and additions being made to her statement. These amendments, clarifications, and additions were then incorporated by me into the English affirmation that she signed on 2 April 1987. Prior to signing the affirmation, I made arrangements for the affirmation to be orally translated in Cantonese to Or Mui-Chu by a Chinese language officer, Choi Chow Wai-chun. I similarly made arrangements for the affirmation to be handed to the Chinese language officer well in advance of the time set aside for the oral translation. I made such arrangements in order that the Chinese language officer would have adequate time to peruse the document and prepare for the oral translation.

10. In relation to the affirmation signed by Liu Shih-kun, I am able to say that the contents of this affirmation came about as a result of an interview held by me with Liu Shih-kun in the last week of March 1987 at the offices of the Commercial Crime Bureau, Hong Kong. As the information that this witness was able to provide in relation to the Union Bank case was extremely brief, I subsequently prepared an affirmation in the English language for this witness from the notes of the contents of the interview. From my fluency in the English and Chinese languages, I have no doubt that the contents of this affirmation reflect fully the matters covered in the interview that I held with Liu Shih-kun. Prior to signing the affirmation, the affirmation was orally translated into Cantonese to Liu Shih-kun by the Chinese language officer, Choi Chow Wai-chun. This witness in fact pointed out to me an error that appeared in paragraph 4 of the affirmation. A correction was therefore made prior to his signing the affirmation.

11. In relation to the affirmations signed by Yeung Yun-tong, Wong Mui, Ching Hon-kuen, Chung Lin-shing, Lee King-mo, Lai Kwo-pui and Tsang Fung-kwan, I am able to say that I prepared the affirmations for these witnesses based on the English translations of the Chinese statements made by these witnesses. The original Chinese statements were then also available to me. In preparing these affirmations, I did, on occasions, as a result of my fluency in English, alter the grammatical form of individual sentences and, on occasions, I altered the order of the paragraphs from the English translation of their statements in order that the subject matter of the affirmations should progress in a coherent manner. I did not, however, change the meaning or sense of the content of the translated versions of their statements in any way.

12. Each of the affirmations referred to in paragraph 11 was orally translated into Cantonese to the individual affirmant by the Chinese language officer Choi Chow Wai-chun, prior to the individual affirmant signing his or her affirmation. In each case, I made arrangements that the affirmations be handed to the Chinese language officer well in advance of the time set aside for translation. I made such arrangements in order that the Chinese

language officer would have ample time to peruse the documents and prepare for their subsequent oral translation.

13. This affirmation in the English language consisting of eight pages has been read over by me. It is true and accurate to the best of my knowledge and belief. I have made it knowing that the making of a false statement is a criminal offense punishable in Hong Kong under Section 33 of the Crimes Ordinance, Cap 200 Laws of Hong Kong.

/s/ LULU YUI
Lulu Yui

Affirmed by the said Lulu Yui at the British Consulate, San Francisco this 14th day of August, 1987 before me, Teresa R. Perrett, British Vice-Consul at San Francisco, California

/s/ TERESA R. PERRETT
BRITISH VICE-COUNSUL
BRITISH-CONSULATE
GENERAL
SAN FRANCISCO

[Seals]

APPENDIX V

IN THE MATTER of the
Extradition Act 1870-1935
and the bilateral treaty
between the United States
of America and the
United Kingdom

and

IN THE MATTER of a request
by the Hong Kong Government
for the extradition of
OEN Yin-choy
James Semaun alias
James SEMAOEN from the
United States of America

/s/ M. D. HILL
Magistrate in and for the
Crown Colony of Hong
Kong

Affidavit of IP Lau-chuen

I, IP Lau-chuen, Chief Inspector of Interpol Section of the Royal Hong Kong Police Force do solemnly and sincerely swear and say as follows:—

1. I am a Chief Inspector with the Royal Hong Kong Police Force currently posted to Interpol Paris. I am fluent in both the Chinese and English languages. From November 1982 to March, 1987, I was posted to the Commercial Crime Bureau. Between the period of September, 1986 and March 1987, I was the officer in overall charge of a police investigation into the affairs of the Union Bank of Hong Kong Limited (hereinafter called UB). I now swear this affidavit as I am informed that the District Court for the Northern District of California, pursuant to the provisions of Article IX(2) of the Anglo-United States Extradition Treaty, has requested further information as to the manner in which certain affirmations, submitted to that Court in support of a request by the Hong Kong Government for the Extradition of

OEN Yin-choy to Hong Kong, came into existence in the English language.

2. As the officer in overall charge of this case, I was responsible for the planning and conducting of the investigation into UB. Working under my direct command were five Detective Inspectors including Women Detective Senior Inspector Lulu YUI, one Detective Sergeant and ten Detective Police Constables. They reported directly to me. In relation to the UB investigation, I assigned Senior Inspector Lulu YUI as the case officer. In February 1987, Senior Inspector Lulu YUI was appointed Officer in Overall Charge of the case following my receipt of instructions that I was to proceed to Paris, France to take up a position with Interpol.

3. The area of investigation concentrated on loans made by UB over a period from January 1980 to December 1984. These loans were allegedly extended to Indonesian borrowers who subsequently defaulted on the repayments of interest and principal.

4. In order to investigate the manner in which the loans had been made and as to the flow of funds the accounting firm of Ernst and Whinney were invited by the Attorney General to conduct an accounting investigation.

5. Based on draft reports of Ernst & Whinney it was necessary to take a number of statements from UB staff and persons who had placed off-shore fixed deposits with UB. A number of these statements were taken in the Chinese Language. The reason for this was because some bank staff, although able to speak and read English, prefered [sic] to give their statements in the Chinese language, whereas some depositors did not speak fluent English.

6. I personally took some of these statements while others were taken by detectives, upon my instructions. Statements taken by detectives working under me were passed back to me for my information and consideration of the contents. As the officer in overall charge of the case these statements would be passed back to me as part of normal procedure.

7. During this type of investigation it is often necessary to interview a witness on a number of occasions. The interviews can

take the form of written statements, notes of interview or a discussion over a period of days resulting in a written statement, and this was the situation in this case.

8. Further interviews with individual witnesses were needed in this case because, often, following the initial interview, material came to light which required further investigation by the Commercial Crime Bureau and Ernst & Whinney to identify pertinent documentary exhibits.

9. Evidence elicited from the interview would then be recorded in the statement format. Whenever draft statements had been prepared they would be handed to the witnesses for them to make any correction, deletion or insertion, if they so required. The statements would then be finalized or rewritten if necessary prior to the witnesses signing them.

10. When a witness statement is recorded in the Chinese Language, it is necessary for the statement to be translated into the English language in order that English Police Officers can read the statement. The normal procedure for the translating of initial statements is that such transactions [sic] are prepared by Police interpreters. Police interpreters are civilians recruited by the Royal Hong Kong Police and they are responsible for translating documents from English into Chinese and Chinese into English. The qualifications for becoming a Police Interpreter are a school leaving certificate with credits in both Chinese and English, as well as at least three years' relevant experience in jobs involving either interpretation and translation work or the frequent use of written and spoken English. There are four levels of Police Interpreters, the most senior being Chief Police Interpreter, followed by Senior Police Interpreter, and the Rank I and Rank II Police Interpreter. At the Commercial Crime Bureau the section is headed by a Senior Police Interpreter and the remainder of the section are all of the Rank I Police Interpreter. All Police Interpreters prior to being posted to the Commercial Crime Bureau must have at least ten years experience as a Police Interpreter. When a document requires translation it will be handed to the Senior Police Interpreter who will allocate a Police Interpreter to translate the document. Once translated it will be handed back to the Senior Police Interpreter for his vetting; if no

corrections are required it will be returned to the officer in overal [sic] charge of the case. If corrections are required, these corrections will be made and the statement then handed back to the officer in overall charge of the case.

11. In addition to Police Interpreters, there is another category of interpreters available within the Hong Kong Government service. These persons are called Chinese Language Officers (hereinafter called "CLO") and work for the Chinese Language Division which comes under the Administrative and Services Branch of Government Secretariat. CLOs are university graduates who have experience in the translation of the Chinese language into the English language and the English language into the Chinese language. CLOs are posted to work in government departments with the responsibility to translate documents.

12. The Commercial Crime Bureau has a unit of 4 CLO's with a Senior Chinese Language Officer (SCLO) in charge of them. Due to the small size of the CLO unit, access to their services is highly limited. When access to the CLO unit is available, the normal procedure for translating a document is that the document will be passed to the SCLO who will assign a CLO to translate the document. Once translated the document will be passed back to the SCLO, who is responsible to ensure that the document has been accurately translated. If an inaccuracy in the translation is found then it will be passed back to the CLO for correction; once the SCLO is satisfied that the document has been accurately translated he will return the document to the officer in the overall charge of the case.

13. In the UB case, all statements that had been taken originally in the Chinese language were translated into the English language by either Police Interpreters or Chinese Language Officers. I then instructed officers of inspectorate rank to prepare affidavits or affirmations in the English language for these witnesses to swear or affirm based on the English translations of the witnesses' statements. To ensure that the witness agreed to the contents of the English affidavit or affirmation that he/she was swearing or affirming, I am aware that arrangements were made for the affirmation or affidavit to be orally translated into Cantonese to the respective witness by a CLO, prior to the witness

swearing or affirming the affidavit or affirmation before the Magistrate. If the witness wished to make any addition, alteration or clarification to the affidavit or affirmation, he or she had the opportunity to make such addition, alteration or clarification prior to swearing or affirming the affidavit or affirmation. Then the affirmation or affidavit is sworn or affirmed by the witness in front of a Magistrate in the presence of a qualified court translator who acts as an interpreter.

14. During the UB investigation statements were taken in the Chinese language from the following witnesses:

OR Mui-chu
YEUNG Yun-tong
LEE Yue-wing
CHING Hon-kuen
LEE King-mo
LAI Kwo-pui
TSANG Fung-kwan
CHUNG Lin-shing
WONG Mui

15. In the case of LEE Yue-wing's final affirmation he was interviewed over a period of time. He provided three statements in the Chinese language. The first statement was taken by Detective Police Constable 21562 on 14.11.86 and the second one was by Detective Sgt 17610 on 28.11.86. The third statement was taken by myself on 7.1.87 and was finalised on the 9.1.87. All these three statements were translated by Police Interpreters.

16. One statement in the Chinese language was taken from OR Mui-chu on 7.2.87 by myself. This was translated by a qualified Police Interpreter into the English language.

17. One statement in the Chinese language was taken from YEUNG Yun-tong on 17.12.86 by D/Sgt 17610, this statement was translated by a qualified Police Interpreter into the English language.

18. One statement in the Chinese language was taken from CHING Hon-kuen on 15.1.87 by myself. This statement was translated by a qualified Police Interpreter.

19. Three statements in the Chinese language were taken from LEE King-mo. The first statement was taken on 8.1.87 by Detective Sgt 17610 and the second statement was also taken by Detective Sgt 17610. The third statement was taken by myself on 5.2.87. All three statements were translated into the English language by a qualified Police Interpreter.

20. One statement in the Chinese language was taken from LAI Kwo-pui on 27.2.87 by Woman Detective Police Constable 15833. This statement was translated into the English language by a qualified Police Interpreter.

21. One statement in the Chinese language was taken from TSANG Fung-kwan on 27.2.87 by Woman Detective Police Constable 15833. This statement was translated into the English language by a qualified Police Interpreter.

22. One statement in the Chinese language was taken from CHUNG Lin-shing on 23.3.87 by Woman Detective Police Constable 15833. This statement was translated into the English Language by a qualified CLO.

23. One statement in the Chinese Language was taken from WONG Mui on 18.3.87 by Woman Detective Police Constable 15833. This statement was translated into the English language by a qualified CLO.

Sworn by the said
IP Lau-chuen at the
Supreme Court,
Hong Kong, this 14th
day of August 1987

/s/ IP LAU-CHUEN

Before me

[Seal]

/s/ M. D. HILL
Magistrate in and for the
Crown Colony of Hong Kong

APPENDIX W

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 19, 1988]

OEN YIN-CHOY, Petitioner/Appellant, v. GLEN S. ROBINSON, United States Marshal for the Northern District of California, Respondent/Appellee.	No. 87-15055 [D.C. No. C-87-4705-RHS] [D.C. No. CR-87-0082-MISC RHS]

ADDENDUM TO
OEN YIN-CHOY'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC
[F.R.A.P. 35 and 40]

CEDRIC C. CHAO
MICHAEL M. CARLSON
JENNY D. SMITH
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104-2105
Telephone: (415) 434-7000
Attorneys for
Petitioner/Appellant
OEN YIN-CHOY

INDEX

Tab	Description
A	Letter from the Honorable Pete Wilson to the Honorable George P. Shultz, October 19, 1988
B	The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for Solicitation of Opinions) (April, 1988)
C	*Human Rights Law is put on hold until BL decides*, Sing Tao International, October 5, 1988
D	Summary of Comments Presented by Amnesty International in a Memorandum on the Draft Basic Law of Hong Kong, July, 1988
E	Amnesty International Memorandum on the Draft Basic Law of the Hong Kong Special Administrative Region, July, 1988
F	*The Basic Law and Hong Kong's Future* (Wesley-Smith & Chen 1988), Chapters 4, 5 and 10

* * *

[Tab A is reproduced at Appendix Y. Articles 16, 169 and 172 of Tab B are reproduced at Appendix Z. Tab D is reproduced at Appendix AA. Portions of Tab F are reproduced at Appendix BB. Complete copies of the exhibits to this Addendum are part of the record in the United States Court of Appeals for the Ninth Circuit.]

APPENDIX X

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 28, 1988]

OEN YIN-CHOY, Petitioner/Appellant, v. GLEN S. ROBINSON, United States Marshal for the Northern District of California, Respondent/Appellee.	No. 87-15055 [D.C. No. C-87-4705-RHS] [D.C. No. CR-87-82-MISC-RHS]

SUPPLEMENTAL ADDENDUM TO
OEN YIN-CHOY'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC
[F.R.A.P. 28(f) and F.R.C.P. 44.1]

CEDRIC C. CHAO
MICHAEL M. CARLSON
JENNY D. SMITH
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
Telephone: (415) 434-7000
Attorneys for
Petitioner/Appellant
OEN YIN-CHOY

SUPPLEMENTAL ADDENDUM TO OEN YIN-CHOY'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Oen Yin-choy submits this Supplemental Addendum to his Petition for Rehearing and Suggestion for Rehearing *En Banc*, pursuant to his Motion to File Supplemental Addendum, filed in this Court on this date.

Dated: October 28, 1988

CEDRIC C. CHAO
MICHAEL M. CARLSON
JENNY D. SMITH
MORRISON & FOERSTER

By CEDRIC C. CHAO
Attorneys for
Petitioner/Appellant
OEN YIN-CHOY

INDEX TO SUPPLEMENTAL ADDENDUM

Exhibit	Description
G	*Human Rights 'Missing from Draft of Law'*, South China Morning Post, December 8, 1987
H	*Human Rights Lacking in Draft*, South China Morning Post, January 12, 1988
I	*Basic Law Threatens Judicial Independence, Claim Lawyers*, South China Morning Post, March 6, 1988
J	*Treason Charges Likely Under Basic Law Draft*, South China Morning Post, April 3, 1988
K	*Draft With Many Flaws*, South China Morning Post, April 28, 1988
L	*Basic Law Leaves Many Doubts About China's Motives*, South China Morning Post, May 2, 1988
M	*Ford to Query Points in Draft*, South China Morning Post, May 3, 1988
N	*Breach of Promise?* Far Eastern Economic Review, May 12, 1988
O	*Some Basic Mistakes*, South China Morning Post, May 18, 1988
P	*Basic Law Fails to Provide for Human Rights*, South China Morning Post, May 21, 1988
Q	*Too Much Authority Invested in First SAR*, South China Morning Post, May 27, 1988
R	*SAR Courts Must Have Power 'To Guarantee Human Rights'*, Hong Kong Standard, June 6, 1988
S	*Bar Warns of Threat to HK Civil Liberties*, South China Morning Post, June 9, 1988
T	*Chief Justice Lists Potential Conflict Areas*, South China Morning Post, June 10, 1988
U	*First Thoughts on Basic Law*, Hong Kong Standard, June 10, 1988
V	*Basic Law Offers Little Protection of Civil Rights*, Hong Kong Standard, June 11, 1988
W	*Political View of the Draft*, South China Morning Post, June 11, 1988

INDEX TO SUPPLEMENTAL ADDENDUM

Exhibit	Description
X	*HK Draft Law Arouses Differing Viewpoints*, China Daily, June 18, 1988
Y	*SAR Gov't Set-Up is China's Job: Drafter*, Sunday Standard, June 19, 1988
Z	*Cater Speaks Out for the Future of HK*, South China Morning Post, June 20, 1988
AA	*The Basic Law*, South China Morning Post, June 25, 1988
BB	*Exodus of HK Elite was Predictable*, South China Morning Post, June 27, 1988
CC	*Expert Opposes Draft's Civil Rights Provisions*, South China Morning Post, July 4, 1988
DD	*Basic Law Draft a Threat, Says Lawyers' Body*, Hong Kong Standard, July 9, 1988
EE	*Why Draft Sours Spirit of Joint Declaration*, Hong Kong Standard, July 15, 1988
FF	*Amnesty Says Draft Flawed and Inadequate*, South China Morning Post, July 21, 1988
GG	*Basic Problems of Law*, Far Eastern Economic Review, August 11, 1988
HH	*Extradition Discussions Extended*, South China Morning Post, August 25, 1988
II	*Constitutional Contradictions Abound in a Sea of Confusion*, South China Morning Post, August 26, 1988
JJ	*Talks to Focus on Future Extradition Procedures*, South China Morning Post, August 28, 1988
KK	*Former Law Lord Criticises Initial Draft*, South China Morning Post, September 17, 1988
LL	*Tilted Balance of Power*, Sunday Standard, September 19, 1988
MM	*Civil Liberties Cannot be Guaranteed, Claim Jurists*, South China Morning Post, October 5, 1988

* * *

INDEX TO SUPPLEMENTAL ADDENDUM

[The exhibits to this Supplemental Addendum are part of the record in the United States Court of Appeals for the Ninth Circuit.]

APPENDIX Y

United States Senate
Washington, DC 20510

October 19, 1988

The Honorable George P. Shultz
Secretary
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary:

The case of Oen Yin-choy, a 69-year old U.S. permanent resident in ill health who resides in California, has come to my attention. Mr. Oen is facing extradition to Hong Kong. I am writing to express concern about this matter and to request certain information relevant to it.

If Mr. Oen is convicted in Hong Kong, he is subject to being incarcerated there beyond July 1, 1997, the date on which the People's Republic of China regains control over the territory. On that date, if Mr. Oen is left imprisoned in Hong Kong, he would come under the jurisdiction of the PRC. Yet, I understand that the Ninth Circuit Court of Appeals in the case *Oen Yin-choy v. Glen Robinson*, issued an opinion on October 5, 1988, holding that the extradition of Mr. Oen to Hong Kong would not be in violation of Article XII(1) of the United States-United Kingdom Extradition Treaty. Article XII(1) provides that:

> [A] person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State — (a) until after he has returned to the territory of the requested Party; or (b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

The Ninth Circuit has apparently taken the puzzling view that the Extradition Treaty prohibits Hong Kong from extraditing Mr. Oen and others in his situation to the PRC, but permits a "surrender" of such persons to the PRC in 1997.

A very significant issue is raised by this case, for while I understand that we do not have an extradition treaty with the PRC, extradition of Mr. Oen at this time could effectively bring him within the PRC's jurisdiction. Certainly this fact, and the possibility that between now and 1997 others may face the same situation faced by Mr. Oen, requires careful consideration by the United States—both the Executive Branch and the Senate.

Unless the United States has been assured by the United Kingdom that, if Mr. Oen is sentenced to serve a term beyond July 1, 1997, he will be removed to the custody of the U.K. outside of Hong Kong prior to that date, then it would appear that Mr. Oen should not be extradited at this time.

I would appreciate receiving your comments relative to my concerns at your earliest convenience.

In closing, I want to note that I am not familiar with the charges against Mr. Oen. Nevertheless, as is the case with any one residing in the United States, legitimate questions of international law and U.S. treaty obligations deserve proper scrutiny in each case in which extradition is sought.

Thank you for your attention.

Sincerely yours,

/s/ PETE WILSON
PETE WILSON

PW:ig

APPENDIX Z

THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA

(For Solicitation of Opinions)

The Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

April 1988

* * *

Chapter II: Relationship between the Central Authorities and the Hong Kong Special Administrative Region

* * *

Article 16 The Hong Kong Special Administrative Region is vested with legislative power.

Laws enacted by the legislature of the Hong Kong Special Administrative Region shall be reported to the Standing Committee of the National People's Congress for the record. The reporting for record shall not affect the entry into force of such laws.

If the Standing Committee of the National People's Congress, after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region, considers that any law of the Region is not in conformity with this Law or legal procedures, it may return the law in question for reconsideration or revoke it, but it shall not amend it. Any law returned for reconsideration or revoked by the Standing Committee of the National People's Congress shall immediately cease to have force. This cessation shall not have retroactive effect.

* * *

Chapter IX: Interpretation and Amendment of the Basic Law

Article 169 The power of interpretation of this Law is vested in the Standing Committee of the National People's Congress.

When the Standing Committee of the National People's Congress makes an interpretation of a provision of this Law, the courts of the Hong Kong Special Administrative Region, in applying that provision, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The courts of the Hong Kong Special Administrative Region may interpret the provisions of this Law in adjudicating cases before them. If a case involves an interpretation of the provisions of this Law concerning defence, foreign affairs and other affairs which are the responsibility of the Central People's Government,

the courts of the Region, before making their final judgment on the case, shall seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

* * *

Chapter X: Supplementary Provisions

* * *

Article 172 At the time of the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they can be annulled or revised according to the procedure as prescribed by this Law.

Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the laws of the Hong Kong Special Administrative Region, provided that they do not contravene this Law.

APPENDIX AA

amnesty international

HONG KONG

SUMMARY OF COMMENTS PRESENTED BY AMNESTY INTERNATIONAL IN A MEMORANDUM ON THE DRAFT BASIC LAW

JULY 1988 SUMMARY AI INDEX: ASA 19/03/08
DISTR: SC/CO/GR

The attached paper is a summary of the main comments presented by Amnesty International in a memorandum on the Draft Basic Law of the Hong Kong Special Administrative Region. The memorandum reviews the Draft Basic Law which has been proposed as a "mini-constitution" when the People's Republic of China resumes sovereignty over Hong Kong on 1 July 1997. The memorandum was sent to the Basic Law Consultative Committee on 15 July and is available publicly (AI Index: ASA 19/02/88).

The memorandum, and the attached summary of comments, examine provisions of the Draft Basic Law which relate to the protection of fundamental human rights. They express Amnesty International's concern that the draft law offers insufficient protection against torture and arbitrary arrest and does not adequately guarantee the right to life and other fundamental rights, including freedom of expression and association and religious freedom.

The two papers also suggest ways that Hong Kong might continue to be afforded the protection of two major United Nations treaties on human rights which now apply to Hong Kong because of their ratification by the United Kingdom.

This summarizes a 4-page document, *The Draft Basic Law of the Hong Kong Special Administrative Region: Summary of comments presented by Amnesty International in a memorandum to the Basic Law Drafting Committee* AI Index: ASA 19/03/88, issued by Amnesty International in July 1988. Anyone wanting

further details or to take action on this issue should consult the full document.

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 8DJ, UNITED KINGDOM

Amnesty International
International Secretariat
1 Easton Street
London WC1X 8DJ
United Kingdom

July 1988

THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

SUMMARY OF COMMENTS PRESENTED BY AMNESTY INTERNATIONAL IN A MEMORANDUM TO THE BASIC LAW DRAFTING COMMITTEE

Amnesty International's memorandum to the Basic Law Drafting Committee focuses partly on specific articles of the Draft Basic Law which appear to fall short of international human rights standards. It also focuses on the question of how Hong Kong can go on enjoying the protection of key international human rights treaties including the International Covenant on Civil and Political Rights (1966), after 1997.

Amnesty International is principally concerned:

(1) that persons in the Hong Kong region should continue to be protected by the fundamental provisions of the International Covenant on Civil and Political Rights;

(2) that they should be afforded clear protections against torture and other cruel, inhuman or degrading treatment or punishment;

(3) that they should be afforded protections for the right to life;

(4) that they should be guaranteed the right to fair trial;

(5) that they should be afforded those rights which will safeguard against the detention of prisoners of conscience; and

(6) that the Draft Basic Law should not include a limitation clause of such a general nature that it could be used to undermine all other human rights protections.

1. *The continuing application of the International Covenants*

The 1984 Sino-British Joint Declaration on Hong Kong stated that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966) "as applied to Hong Kong shall remain in force" after 1997. But the Draft Basic Law does not make clear how this will happen. Article 38 of the Draft Basic Law simply states that the provisions of the two Covenants as applied to Hong Kong "shall be implemented through legislation by the Hong Kong Special Administrative Region".

In Amnesty International's view there are two ways by which the Covenants, as applied to Hong Kong, can be kept in force:

(1) Firstly, Hong Kong can become a party in its own right to the two International Covenants.

Alternatively, the People's Republic of China (including the Hong Kong Special Administrative Region) can become a party to the Covenants. In this case, each of the periodic reports by the People's Republic of China to the Human Rights Committee (which is the committee established under the Covenant to monitor its implementation) would include a separate section about the Hong Kong Special Administrative Region presented by the Hong Kong authorities.

Amnesty International also believes that human rights in Hong Kong would be further strengthened by ratification of the Optional Protocol to the International Covenant on Civil and Political Rights, which allows for individuals to bring complaints of alleged human rights violations to the Human Rights Committee.

(2) Additionally, Article 38 of the Draft Basic Law can be amended to provide that the terms of the two Covenants are a part of the law of the Hong Kong Special Administrative Region

and shall be implemented through both legislation and by action of the courts of the Hong Kong Special Administrative Region. By permitting the courts of the Hong Kong Special Administrative Region to enforce the terms of the Covenants, the people of the Hong Kong Special Administrative Region will be better assured that their rights are protected.

2. *Human rights and the Basic Law*

2.1 *Guarantees for fundamental rights*

Several fundamental human rights of concern to Amnesty International are not found in the Draft Basic Law. In Amnesty International's view these rights should be specifically guaranteed.

These rights include the right to protection against torture and other cruel, inhuman or degrading treatment or punishment, which have been condemned by the United Nations (UN) General Assembly as offences to human dignity. The Draft Basic Law does not include any such protection.

The Basic Law should incorporate specific safeguards against torture, such as those recommended by the Human Rights Committee in general comment 7(16) on Article 7 of the International Covenant on Civil and Political Rights (see page seven of Amnesty International's memorandum). The Basic Law could also incorporate by reference the provisions of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), which provides for specific measures to be taken by governments for protection against torture.

The Draft Basic law does not guarantee the right to life.

Amnesty International recommends that the Basic Law specifically protects the right to life by abolishing the death penalty. If this humanitarian step cannot be taken, at least the Basic Law should include an assurance that Hong Kong's current policy of not carrying out death sentences will be continued after 1 July 1997.

Although the Draft Basic Law contains a number of provisions directed towards the protection of the right to fair trial, these are

not as specific as those found in Articles 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights.

Amnesty International recommends that the specific guarantees for fair trial of the International Covenant on Civil and Political Rights be incorporated by reference in the Basic Law.

The Draft Basic Law does not guarantee the right to be free from arbitrary arrest, detention or imprisonment and includes some provisions which pose significant risks to human rights defenders, journalists, religious teachers or leaders, politically active individuals, leaders of minorities, and others who might be imprisoned for the peaceful exercise of fundamental rights.

Amnesty International recommends that Article 27 of the Draft Basic Law incorporates a specific guarantee against arbitrary arrest or imprisonment; that Articles 17, 22 and 29 be reviewed to ensure that their provisions do not conflict with this guarantee; and that additional provisions be incorporated to guarantee the right of minorities and of religious freedom in accordance with the International Covenant on Civil and Political Rights.

2.2 *The limitations clause*

Article 39 of the Draft Basic Law includs a limitations clause of such a general nature that it could undermine some or all of the rights prescribed in the other provisions of the Draft Basic Law or in any additional clauses which might be added. Such a broad limitations clause could be used as a possible legal basis for nullifying all of the Fundamental Rights and Duties of the Residents in Chapter III of the Draft Basic Law.

The human rights provisions of the Basic Law would be greatly strengthened if Article 39 were replaced by specific reference to or incorporation of Article 4 and other provisions of the International Covenant on Civil and Political Rights which specify for each right the conditions, if any, under which it may be limited and those rights from which there can be no derogation.

2.3 *Enforcement of human rights guarantees*

Amnesty International considers that all the fundamental rights provisions of the Basic Law must be justiciable if they are to be effective, since even the most generously drafted guarantees for fundamental rights would be of little worth if they could not be enforced effectively by the courts. Thus it is important that the courts of the Hong Kong Special Administrative Region be given the power to review the compatibility of any legislation and official acts with the rights and freedoms guaranteed in the Basic Law.

The International Covenant on Civil and Political Rights also provides that individuals whose rights and freedoms have been violated shall have an effective remedy to challenge such violations, notwithstanding that the violation has been committed by persons acting in an official capacity (Article 2(3)).

Article 34 of the Draft Basic Law does guarantee Hong Kong residents the right to challenge executive acts in the courts, but it does not make clear whether such challenge may be based on the provisions of the Basic Law, as opposed to other laws. It also omits to mention challenge of legislative acts.

Amnesty International believes that these questions can be resolved by providing in the Basic Law that the courts of the Hong Kong Special Administrative Region have the power to review the compatibility of any legislation and official act with the rights and freedoms guaranteed in the Basic Law, and by giving individuals the right to challenge in court any violation of their basic rights and freedoms.

APPENDIX BB

THE BASIC LAW AND HONG KONG'S FUTURE

Edited by

PETER WESLEY-SMITH, BA, LLB (Adelaide), PhD (HK)
Professor, Department of Law, University of Hong Kong

ALBERT H Y CHEN, LLB, PCLL (HK), LLM (Harvard), Solicitor
Senior Lecturer, Department of Law, University of Hong Kong

Butterworths
Hong Kong - Singapore - Malaysia
1988

* * *

[p. 76] PROBLEMS AND DIFFICULTIES

Up to the end of April 1988, the Hong Kong experience may be said to contain three main parts, namely, the Sino-British negotiations, the drafting of the SAR Basic Law, and the events associated with the British Hong Kong government's efforts to introduce a more representative government in the territory. The first is a matter of international diplomacy while the last two are domestic affairs within the jurisdiction of the PRC government and the British Hong Kong government respectively. Pertinent problems and difficulties that have surfaced include the following.

In the beginning, many observers discovered that few Beijing leaders had a realistic and accurate understanding of Hong Kong. Those accustomed to viewing the world from the perspective of the Chinese middle kingdom or Marxist philosophy seemed to be equally ignorant and self-righteous in their opinions about how a capitalist colony like Hong Kong could best be governed. This scared quite a number of the Hong Kong elite. There was much anxiety, and remedial lobbying (or educating) efforts were undertaken by leading figures in the early stage of the negotiations. Fortunately, the leaders in Beijing were wise enough to put those in the know in key positions to deal with the British and Hong Kong representatives so that the damage was not too great.

Next, the people of Hong Kong were frustrated because they could not take part in the negotiations which were to decide their own fate.[9] Both the British and the Chinese claimed that they [p. 77] represented the interest of the Hong Kong people, but in fact the last were over-represented in some areas and inadequately represented in others. Throughout the whole process, they could only traverse the halls in Beijing and London to lobby the two negotiating parties. This they did to their own potential peril

---

[9] Some people in Hong Kong put forward the 'three-legged stool' argument. Some also argued that 'residual power' should rest in the Hong Kong people. Both groups were frustrated. For a summary of public opinion polls and representative samples of the views of major groups and the media in Hong Kong during the Sino-British negotations, see Joseph Y S Cheng (ed), *Hong Kong in Search of a Future* (Hong Kong: Oxford University Press, 1984).

since such actions reflected their locus of loyalty and could affect their future careers. Had Hong Kong been negotiating for post-colonial arrangements on its own as many former British colonies have done, the situation would certainly have been different.

The Hong Kong people would later be reminded time and again by mainland sources that the British would return sovereign authority of Hong Kong to the PRC, not to them. The future government of the SAR would be directly under the Central People's Government. Its power would come from the NPC, not from the people of Hong Kong. Hence, whatever the NPC chose not to authorise, the SAR government could not do. The people of Hong Kong are not sovereign and therefore enjoy no legal powers other than those granted to them by the Basic Law.

Third, the Joint Declaration, with its 12-point statement and 14 items of concrete explanations, constitutes Beijing's new Hong Kong policy.[10] It has been welcomed by the people of Hong Kong. Yet, the people of Hong Kong have also learnt that the said document is somewhat less than the international guarantee that they had hoped for. A joint declaration is more an announcement of intention rather than a binding treaty with provision of clear obligations that the parties must perform. However, that is not the real problem. What is pivotal is that the document amounts to a mere unilateral declaration of policy by the PRC towards the Hong Kong people. In the words of a Beijing legal authority,[11] 'the British pledged to return Hong Kong to the PRC, but the PRC made no pledge to the British.' Should Beijing renege on its promises later, the British government would be in no position to help the people of Hong Kong other than to give moral support.

Fourth, Beijing has promised, among other things, a highly autonomous SAR in which Hong Kong people will rule over Hong Kong. However, the drafting process and the provisions of the Basic Law have shown that Beijing's rulers have no intention of creating a truly autonomous Hong Kong-run SAR. The BLDC membership is predominantly mainland Chinese. Even the Con-

---

[10] See n 6 above.

[11] See *Kuai Bao*, 25 September 1984.

sultative Committee, which is meant to be representative of the Hong Kong public, operates under the control of an [p. 78] Executive Committee 'elected' in a forced, clearly undemocratic fashion amidst loud protests.[12] There has been no lack of debates. Dissident opinions are allowed an airing but there is no doubt as to the outcome regarding an issue where Beijing has expressed a clear view.

As to the articles of the Basic Law, the following points obviously indicate potential central control or intereference in the affairs of the SAR, contrary to the promise of a high level of autonomy.[13]

(1) The government design clearly favours a strong Chief Executive who will dominate the other branches of the SAR government but who will be under the control of Beijing. The CE, as he or she appears in the Basic Law, resembles the powerful British colonial Governor of Hong Kong who is by law accountable only to London, not to anyone in Hong Kong.

The CE shall be appointed by the CPG on the basis of the results of elections or consultations to be held locally. Beijing, with the co-operation of some Hong Kong business elite, will be able to manipulate and to control the process of producing the CE. His or her appointment by the CPG is not likely to be just a pro forma exercise (BL14, 45 and Annex I, BL).

There will be an Executive Council to assist the CE in policy-making. Its members are appointed by and responsible only to him or her (BL54-56).

The principal officials of the various departments of the SAR executive authorities shall be appointed by the CPG upon nomination by the CE. Some critics are asking whether the scope of 'principal officials' designated in the Basic Law has expanded beyond what is described in the Joint Declaration (BL48(5)).

---

[12] See Yu Jiwen, 'Consultative Committee: Established to Control the Popular Will?' 192 *Jiushi Niandai* 46-49 (January 1986).

[13] The following points have all been derived from the Basic Law of the SAR.

(2) The CE shall be 'responsible to the Central People's Government and the HKSAR.' (In that order?) The question is raised as to why the CE is made responsible to the 'HKSAR' and not to its Legislative Council (BL43).

Among other duties, the CE is 'to execute the directives given by the CPG in respect of matters provided by this law' (BL48(8)). Presumably, he or she is to do so without questioning them on any ground.

(3) The CE shall have the power to return a bill passed by the Legislative Council for reconsideration. Furthermore, he or she can dissolve the legislature with the approval of the CPG (BL49, 50).

[p. 79] It is also proposed to give the CE the power to control the introduction of bills by members of the Legislative Council (BL73, alternative 1).

(4) The SAR legislature can move to impeach the CE only on two grounds: serious breach of law or dereliction of duty. The impeachment procedures require one-fourth of all members to move it and two-thirds of all members to agree to it. Even then, such a proposal 'shall be reported to the Central People's Government for decision' (BL72(9)).

Under certain circumstances, the Legislative Council can also force the CE to resign. But this is possible only when he or she has dissolved the Legislative Council, and the newly elected legislature (a) still passes the original bill, which the CE had refused to sign twice, with a two-thirds majority; or (b) still refuses to approve the budget or to pass an important bill proposed by the CE (BL52(2), (3)).

(5) The question whether the CE should be the presiding officer of the legislature is still to be decided (BL70). However, the President of the Legislative Council shall be vested with the power to 'announce that a member of the Legislative Council will no longer be qualified for such an office' under certain conditions. Such conditions include the member's inability to discharge the functions of his or her office due to serious illness 'or other reasons' (BL78).

The proposed system, in spite of its checks-and-balance mechanisms, clearly subordinates the Legislative Council, which is more likely to be Hong Kong-oriented, to the CE, who is likely to be Beijing-oriented, in terms of their power relationships.

(6) Laws enacted by the SAR legislature shall be reported to the Standing Committee of the National People's Congress for the record, and if the latter considers that such laws are 'not in conformity with this Law or legal procedures,' it may return them for reconsideration or revoke them (BL16).

(7) The power of interpretation of the Basic Law shall be vested in the NPCSC. Such interpretations are binding on the SAR courts. These courts may interpret only those articles of the Basic Law which are within the scope of the SAR's autonomy and only when they are adjudicating cases (BL169).

* * *

[p. 218] International covenants (BL38)

Specific reference to the two International Covenants in the Joint Declaration aroused a fervent hope that Hong Kong will, for the first time, have a constitutional code of human rights commensurate with international standards. At the same time, critics had not been slow to point out that the two covenants, as international treaties, were not enforceable in the domestic courts.[30] They have to be implemented by the local legislature. There is almost unanimous support by writers in Hong Kong for the entrenchment of at least the International Covenant on Civil and [p. 219] Political Rights by giving it legal effect through the Basic Law. It was a great disappointment when the drafters failed to live up to this expectation.

The earlier draft of BL39 was almost a replica of the relevant provision of the Joint Declaration, which shows no intention to entrench the International Covenants at all. It was only under pressure from the legal profession that some cosmetic modifications were made. The present BL39 requires the SAR to imple-

---

[30] See J Chan 'Basic Law and the International Covenant' in A Chen and J Chan (n 3 above) and references in J Chan, 'A Bill of Rights for Hong Kong?' in R Wacks (ed), *Civil Liberties in Hong Kong* (n 19 above) at n 5 thereof.

ment through legislation the provisions of the International Covenants as applied to Hong Kong. To the credit of the drafters, this is more positive than its predecessor. Nevertheless, unless and until such legislation is perfected, the International Covenants are not fully enforceable in our local courts. Even when such laws are in force, being ordinary laws made by the local legislature they are not entrenched and are themselves subject to repeal. It seems that the BLDC never intended to entrench the International Covenant in the Basic Law. What was envisaged was that the provisions of the International Covenants have been or will be transformed into local law. Thus the provision on the inherent right to life is regarded to have been implemented by the law on the offence of murder. The drafters defended their stand by pointing out that this is the existing system.

With respect, this is a disappointingly short-sighted and unimaginative approach. The drafters were charged with a task which was unprecedented. The object of chapter III is to ensure effective protection of human rights after the change of sovereignty (or its exercise). The relevant consideration for the drafters should be whether entrenchment would afford better protection of human rights. They should not be tied down by the existing system. Retention of the present system in this regard means that implementation of the International Covenants would depend very much on the initiative and perceptions of the executive; such implementation would necessarily be in an ad hoc, reactive, and piecemeal fashion. The British experience in protecting civil rights by way of such piecemeal, ad hoc legislation has resulted in the UK's distinguished record under the European Convention of Human Rights: for many years it has been the country receiving the largest number of complaints of violations of the European Convention and with the largest number of judgments entered against it!

It is regrettable that the drafters did not see fit to exploit the wisdom and meticulous drafting of the International Covenants, the drafting of which took almost two decades. In terms of clarity, comprehensiveness, and detail, the provisions on substantive rights in chapter III compare poorly with the International Covenant on Civil and Political Rights. There is no [p. 220]

reference to the right to life,[31] the right not be be subjected to torture or to cruel, inhuman, or degrading treatment or punishment, the right not to be subjected to medical or scientific experimentation without free consent, the right not be be held in servitude, the right to privacy, or the right to non-discrimination in the enjoyment of fundamental rights and freedoms. The extensive procedural safeguards for a person who has been lawfully arrested are reduced to minimum brevity in BL86. There are no restrictions on derogation of fundamental rights in times of emergency. It is not clear whether freedom of speech under BL26 includes the right to seek and receive information and ideas of all kinds. Nor is it clear, ironically, whether freedom of religious belief includes freedom to preach in private!

This is not to undermine the hard work of the drafters in the last two years. The easiest way to remedy these defects is to give legal effect to the International Covenants. Despite repeated calls from lawyers and academics, the drafters still refused to entrench the International Covenants, this time by referring to drafting difficulties. With respect, there are at least three different formulae which have been proposed, and technicality is no excuse at all. Because of the different nature of the rights involved, the two covenants should receive slightly different treatment. It is submitted that BL38 be replaced by the following article:

> The provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong shall be enforceable in the courts of the Hong Kong Special Administrative Region and shall, to the extent of inconsistency, prevail over any law of the Hong Kong Special Administrative Region.
>
> The provisions of the International Covenant on Economic, Social, and Cultural Rights as applied to Hong Kong shall be implemented, and if apppropriate, through legislation, by the Hong Kong Special Administrative Region.

* * *

---

[31] The right to life was considered and rejected by the sub-group on the ground that it might prohibit the death penalty, a subject on which there is no public consensus.

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1481

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1988

OEN YIN-CHOY, PETITIONER

v.

GLEN S. ROBINSON, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

22pp

QUESTIONS PRESENTED

1. Whether petitioner's extradition to Hong Kong violates the terms of the extradition treaty between the United States and the United Kingdom.

2. Whether the extradition court erred in denying petitioner's request for the production of prior statements by several witnesses whose affidavits were admitted at the extradition hearing.

3. Whether the extradition court abused its discretion in denying petitioner's request to question the Hong Kong case agent, who was present but did not testify at the extradition hearing.

4. Whether the extradition court properly admitted evidence that satisfied the requirements of 18 U.S.C. 3190 and the applicable extradition treaty.

5. Whether the district judge was required to recuse himself from presiding over petitioner's habeas corpus proceeding because he had presided over petitioner's extradition hearing.

6. Whether the extradition court properly excluded evidence offered by petitioner on the ground that the evidence was offered to contradict, rather than explain, the evidence offered by the government.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Argento v. *Horn*, 241 F.2d 258 (6th Cir.), cert. denied, 355 U.S. 818 (1957) 12
Assarsson, In re, 635 F.2d 1237 (7th Cir. 1980), cert. denied, 451 U.S. 938 (1981) 12
Benson v. *McMahon*, 127 U.S. 457 (1888) 11
Bingham v. *Bradley*, 241 U.S. 511 (1916) 11, 14
Brinegar v. *United States*, 338 U.S. 160 (1949) 11
Charlton v. *Kelly*, 229 U.S. 447 (1913) 11
Collins v. *Loisel*, 259 U.S. 309 (1922) 10, 12, 13, 14, 17, 18
David v. *Attorney General of the United States*, 699 F.2d 411 (7th Cir.), cert. denied, 464 U.S. 832 (1983) 15
Demjanjuk v. *Petrovsky*, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) 15, 16
Emami v. *United States District Court*, 834 F.2d 1444 (9th Cir. 1987) 13, 14
Extradition of Tan Yee-Chun, In re, 674 F. Supp. 1058 (S.D.N.Y. 1987) 7
Fernandez v. *Phillips*, 268 U.S. 311 (1925) 10, 15
Freedman v. *United States*, 437 F. Supp. 1252 (N.D. Ga. 1977) 12
Gerstein v. *Pugh*, 420 U.S. 103 (1975) 11
Greci v. *Birknes*, 527 F.2d 956 (1st Cir. 1976) 13
Grin v. *Shine*, 187 U.S. 181 (1902) 11
O'Brien v. *Rosman*, 554 F.2d 781 (6th Cir. 1977) 12
Rice v. *McKenzie*, 581 F.2d 1114 (4th Cir. 1978) 16
Shapiro v. *Ferrandina*, 478 F.2d 894 (2d Cir. 1973) 14
Terlinden v. *Ames*, 184 U.S. 270 (1902) 7

Page

United States v. *Parker*, 742 F.2d 127 (4th Cir. 1984) 17
United States v. *Southard*, 700 F.2d 1 (1st Cir.), cert. denied, 464 U.S. 823 (1983) 14
Zanazanian v. *United States*, 729 F.2d 624 (9th Cir. 1984) 13, 14

Treaties, statutes and rules:

Treaty of Extradition, June 8, 1972
United States-United Kingdom-Northern Ireland, 28 U.S.T. 227, T.I.A.S. No. 8468:
Art. XII, 27 U.S.T. 233 ..... 2, 7
Art. XII(1), 27 U.S.T. 233 6-7
18 U.S.C. 3184 15
18 U.S.C. 3190 .....12, 13, 14
28 U.S.C. 455(a) 15
28 U.S.C. 2241 ..... 4, 15
Fed. R. Evid.:
Rule 902 14
Rule 902(1) 14
Rule 902(3) 14

Miscellaneous:

132 Cong. Rec. §9120 (daily ed. July 16, 1986) 2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1481

OEN YIN-CHOY, PETITIONER

v.

GLEN S. ROBINSON, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-22) is reported at 858 F.2d 1400. The certificate of extraditability entered by the district court (Pet. App. 39-40, 51-52) and the order denying the petition for a writ of habeas corpus (Pet. App. 53-54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1988. A petition for rehearing was denied on December 7, 1988. The petition for a writ of certiorari was filed on March 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Extradition to the Crown Colony of Hong Kong is governed by an extradition treaty between the United States, United Kingdom ~~and Northern Ireland~~, June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468 (Treaty), and a 1986 supplementary treaty (132 Cong. Rec. S9120 (daily ed. July 16, 1986)) (Supplementary Extradition Treaty). See Pet. App. 1-6. The Treaty obligates the United States to extradite fugitives to the United Kingdom, including the Crown Colony of Hong Kong, when the request for extradition is supported by a sufficient showing and there is no basis under the Treaty to deny the extradition. Attached to the Treaty is a list of extraditable offenses, those offenses include the crimes of "theft, larceny, embezzlement," "obtaining property, money or valuable securities by false pretenses or other form of deception," "false accounting," and "fraud or false statements by company directors and other officers."

Article XII of the Treaty sets forth the "rule of speciality," which limits the requesting State's right to proceed against the fugitive "for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted." Article XII also limits the requesting State's ability to extradite the fugitive to a third State without the consent of the sending State.

2. During the 19th century, Great Britain concluded three treaties with the Imperial Government of China under which most of the territory comprising Hong Kong was leased to Great Britain for 99 years, and the remainder was ceded to Great Britain in perpetuity. On December 19, 1984, the United Kingdom and the People's Republic of China signed the Joint Declaration on the Question of Hong Kong, which provides that the People's Republic of China will resume the exercise of sovereignty over Hong Kong on July 1, 1997. Pet. App. 12.

3. On February 20, 1987, the Hong Kong Magistrate's Court issued a warrant of arrest charging petitioner with false accounting and publishing a false statement. Two weeks later, the United States District Court for the Central District of California issued a provisional arrest warrant against petitioner, on a complaint filed at the request of the Embassy of the United Kingdom. On April 15, 1987, the United States filed a formal request to extradite petitioner to Hong Kong.

The Hong Kong arrest warrant alleged in six counts that while serving as chairman of the Union Bank of Hong Kong, petitioner embezzled a total of approximately $26,750,000 through false accounting practices. According to the arrest warrant, petitioner's acts constituted the crime of "false accounting" under the laws of Hong Kong. A seventh count alleged that petitioner entered false information in the bank's annual report, conduct that was said to constitute the crime of making a false statement under Hong Kong law.

The evidence at the extradition hearing, which is recounted in detail in the government's brief in the court of appeals (Gov't C.A. Br. 6-19), consisted principally of bank documents (some signed by petitioner), affidavits, the affidavit of an accountant affiliated with the firm of Ernst & Whinney and hired by the Government of Hong Kong, and the accountant's report. The evidence showed that between 1975 and 1984 customers of the Union Bank of Hong Kong deposited large sums of money with the Bank for offshore placement in American dollars. Those transactions were designed to produce tax benefits for the investors. The deposited funds, however, were not placed offshore, but instead were diverted to two "in house" accounts, from which much of the money was spent. Following a change in the tax laws, the offshore deposits lost

their tax advantages, and by 1983-1984 many depositers sought to withdraw their funds.

In 1984 petitioner personally approved four fictitious loans that were entered into the Bank's records and were used to raise funds that could be used to pay back some of the Bank's customers. The five loans totalled approximately $26,750,000. Petitioner later concurred in the publication of an Annual Report for the Bank, which falsely stated that the "loans" were assets of the Bank.

Based on that evidence, the district court found probable cause to believe petitioner committed the crimes alleged in the arrest warrant; in fact, the district court found that probable cause "is written all over the case." Pet. App. 37. As the court explained, "There is ample evidence of misusing the processes of the bank. There is ample evidence of putting these loans through in totally irregular fashion. There is ample evidence of misleading the bank authorities, other than the participants, as to the identity of the borrowers, the true identity of the borrowers, the intended use of the funds, the prospects of repayment." Excerpt of Record 110. Accordingly, the court executed a certificate of extraditability directed to the Secretary of State. Pet. App. 39-40. The court stayed the issuance of the certificate, however, to give petitioner an opportunity to seek review of the extradition order.

4. On September 10, 1987, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241. In that pleading, petitioner alleged that the proposed extradition violated the terms of the Treaty, because if petitioner were extradited to Hong Kong, he might be surrendered to the People's Republic of China on July 1, 1997, as a result of the reversion of Hong Kong to Chinese control. Petitioner also claimed that the extradition proceeding was flawed in several respects: he challenged the district court's acceptance of English-language affidavits from several

Chinese witnesses who were unable to speak or read English; he attacked the court's refusal to grant his discovery requests; and he protested the court's refusal to allow his attorney to argue the points raised in the habeas petition or to call a witness at the extradition hearing. In addition, petitioner complained that the offenses identified in the arrest warrant were not covered by the Treaty; he contended that he was not given sufficient notice of the pending charges prior to the extradition hearing; he challenged the sufficiency of the proof that he committed the charged offenses; and he argued that the district court erred in overruling a number of evidentiary objections he had made at the extradition hearing.

Through the district court's random assignment system, the habeas corpus case was assigned to the same district judge who had sat on the extradition matter. Petitioner moved to have the case reassigned to a different judge, but the motion was denied.

At a hearing on the habeas corpus petition, the district court amended the certificate of extraditability. Pet. App. 51-52. The amended certificate found no probable cause to support the charge that petitioner committed a crime of false accounting "with intent to cause loss to another," but affirmed the earlier finding of probable cause that petitioner had engaged in the alleged conduct "with a view to gain for himself or another," within the meaning of the applicable Hong Kong criminal statute. The following day, the district court entered an order denying petitioner's habeas corpus petition. Pet. App. 53-54.

5. The court of appeals affirmed. Pet. App. 10-22. The court found that (1) petitioner's extradition would not violate the Treaty's rule of speciality (*id.* at 13-14); (2) petitioner's alleged offenses met the requirement of dual criminality under the Treaty, and the district court's failure to make specific findings to that effect was not

critical (*id.* at 14-15); (3) the English-language affidavits were properly admitted even though the affiants could not read English, since the translators affirmed that the written affidavits represented accurate translations of the witnesses' statements (*id.* at 16); (4) the court's finding that the witnesses had not first prepared any affidavits in Chinese was not clearly erroneous (*id.* at 16-17), and thus the court acted within its discretion in not ordering disclosure of the Chinese affidavits (*id.* at 17); (5) the district court properly disposed of petitioner's objections to the competency of the evidence (*id.* at 17-18); (6) petitioner had no right to cross-examine witnesses at the extradition hearing (*id.* at 19); (7) the warrant of arrest was sufficient to apprise petitioner of the charges against him (*id.* at 20); (8) the district court did not abuse its discretion in denying petitioner's motion for discovery (*ibid.*); (9) there was probable cause to believe that petitioner committed the offenses of false accounting and publishing a false statement (*id.* at 20-21); and (10) the district court was not required to recuse itself from presiding over the habeas corpus hearing simply because it had earlier ruled on the extradition request (*id.* at 21-22).

ARGUMENT

1. Petitioner first contends (Pet. 6-11) that because the People's Republic of China will resume sovereignty over Hong Kong in 1997, it is possible that if petitioner is tried and convicted in Hong Kong, and if he is given a long sentence of incarceration, he may ultimately be subject to the jurisdiction of the People's Republic of China. Petitioner claims that in that event, he will effectively have been extradited to the People's Republic of China, in violation of the prohibition against extradition to a third nation, which is set forth in the second precondition of Article XII(1) of

the Treaty ("[a] person extradited [shall not] be extradited by [the requesting] Party to a third State"). In addition, petitioner contends that once Hong Kong is under China's jurisdiction, petitioner may be subject to additional charges, in violation of the rule of speciality set forth in the first precondition of Article XII of the Treaty ("[a] person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than [the offense] * * * [for] which extradition has been granted"). The court of appeals properly rejected these contentions (Pet. App. 13-14). The 1997 resumption of sovereignty by the People's Republic of China will not effect an "extradition" of petitioner to China, as that term has been defined by this Court—*i.e.*, the "surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands his surrender." *Terlinden* v. *Ames*, 184 U.S. 270, 289 (1902). If petitioner is surrendered to Hong Kong before 1997, he will be extradited to a territory (1) that is a party to the Treaty, (2) that demands his surrender, and (3) that is competent to try him and to punish him. Petitioner will not be extradited to China, even if the People's Republic of China resumes sovereignty over Hong Kong while petitioner is still in the custody of the Hong Kong government. Consequently, petitioner's extradition to Hong Kong does not violate the Treaty's ban against extradition to a third State. See *In re Extradition of Tang Yee-Chun*, 674 F. Supp. 1058, 1068-1069 (S.D.N.Y. 1987).

Nor will petitioner's extradition violate the rule of speciality embodied in the Treaty. The Treaty binds the Government of Hong Kong to prosecute petitioner only for the crimes listed in the extradition order, but it does not address the disposition of previously extradited per-

sons following a change in sovereignty. The question whether a person in petitioner's position may be prosecuted by a State resuming sovereignty (but not a party to the Treaty) is simply not answered by the Treaty; petitioner's extradition is therefore not contrary to the Treaty on that ground.

In addition to the absence of any support in the Treaty for petitioner's argument, the background of the Supplementary Extradition Treaty indicates that the Treaty was not intended to ban the extradition of a fugitive such as petitioner. As the court of appeals noted, both the United States and the United Kingdom were well aware of Hong Kong's impending return to Chinese sovereignty at the time they signed the Supplementary Extradition Treaty on June 25, 1986. Nonetheless, the parties neither restricted nor intended to restrict Hong Kong extraditions to offenses that could not lead to imprisonment for a period extending past the date of reversion. That is strong evidence that the Treaty was not intended to foreclose the extradition of persons such as petitioner, who might conceivably be subject to the jurisdiction of the People's Republic of China before the end of his Hong Kong prison sentence.

In any event, the question petitioner presents is one that, by petitioner's own admission (Pet. 4), has not been considered by any other appellate court. It is a narrow and fact-bound issue that will arise only in cases involving requests for extradition to the Crown Colony of Hong Kong during the next eight years. The issue is therefore not of sufficient general importance to warrant review by this Court.

2. Petitioner next contends (Pet. 11-14) that the district court should not have permitted the introduction of several English-language affidavits without affording petitioner the opportunity to read the original statements,

in Chinese, from which the affidavits were prepared. As both courts below concluded, this claim is meritless.

Petitioner suggests that the English-language affidavits that were admitted at the extradition hearing were each prepared by translating a Chinese-languge draft affidavit into English. The district court found to the contrary, and the record makes it clear that the process of preparing the affidavits was not as petitioner suggests.

Two of the Hong Kong law enforcement officials who were responsible for the investigation explained how the English-language affidavits were prepared. Chief Inspector Ip Lau-Chuen and case agent Lulu Yui explained that a number of witnesses made statements in Chinese that were reduced to writing at various points in the investigation. Lulu Yui was then assigned the task of preparing the affidavits that would be used to support the extradition request. In performing that task, she reviewed the witnesses' prior statements and, in some cases, reinterviewed the witnesses to obtain more information. Based on the materials in the file and her interviews with the witnesses, Lulu Yui prepared the English-language affidavits that were to be used in the extradition hearing. She then had the affidavits orally translated into Chinese and read to the witnesses for them to approve. Even with respect to witnesses whom she did not formally reinterview, Lulu Yui prepared English-language affidavits and then had the affidavits orally translated into Chinese for the witnesses prior to each witness's affirming and signing his or her affidavit. Pet. App. 95-98, 100-104. Thus, as the American prosecutor explained to the district court, Pet. App. 30, the English-language affidavits submitted to the court were not originally written in Chinese and then translated into English; the government therefore did not deprive petitioner of the opportunity to compare any Chinese-

language "draft affidavits" with their English-language translations.

Petitioner's account (Pet. 13 n.9) of how the English-language affidavits were prepared distorts the process by omitting a key step. According to petitioner, by the time the affidavits were submitted the original witness statements had been re-worked by multiple layers of police. What petitioner fails to mention is that, as both Lulu Yui and Ip Lau-Chuen explained, the witnesses approved and authorized the affidavits, as orally translated into Chinese, immediately prior to signing them. As a result, the accuracy of any translations of prior witness statements is irrelevant, since the witnesses directly affirmed the accuracy of the final affidavits, as translated orally into Chinese.

3. Petitioner next contends (Pet. 14-16) that he should have been allowed to question case agent Lulu Yui, who submitted an affidavit and was present but did not testify at the extradition hearing.

At the hearing, petitioner announced his desire to examine Lulu Yui to "go over her declaration that she submitted to the Court to go into the interview procedures, to go into her note-taking procedure, to examine those witness statements, the original Chinese witness statements, what the basis was and how they were changed" (Pet. App. 37). The district court denied that request based on its judgment that the examination of Lulu Yui would not "be productive" (*ibid.*).

As the court of appeals recognized (Pet. App. 18-19), there is no constitutional right to cross-examine witnesses at an extradition hearing. Unlike a criminal trial, an extradition hearing focuses on whether there is probable cause to believe that the fugitive committed an extraditable offense. *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *Collins* v. *Loisel*, 259 U.S. 309, 316 (1922);

Charlton v. *Kelly*, 229 U.S. 447, 457-462 (1913); *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888). An extradition hearing is therefore akin to a preliminary hearing or a grand jury proceeding. The Constitution does not require an adversary hearing to establish probable cause to charge a defendant with a crime, whether that finding is made by a court in a preliminary hearing or by a grand jury. *Gerstein* v. *Pugh*, 420 U.S. 103, 121-122 (1975); *Brinegar* v. *United States*, 338 U.S. 160, 174-175 (1949). Consequently, since a fugitive at an extradition hearing has no constitutional right either to offer exculpatory evidence or to examine witnesses, *Charlton* v. *Kelly*, 229 U.S. at 462, the district court's refusal to permit the examination of Lulu Yui did not violate any fundamental right of petitioner.

Petitioner is incorrect in suggesting (Pet. 16) that this Court's decisions in *Grin* v. *Shine*, 187 U.S. 181 (1902), and *Bingham* v. *Bradley*, 241 U.S. 511 (1916), are irreconcilable on this issue and that certiorari should be granted to address the inconsistency between the two decisions. In *Grin*, the Court prefaced its discussion of the claimed errors by noting that persons subject to extradition "are entitled to the same defences as others accused of crime within our own jurisdiction" and that the Court must not sacrifice the fugitive's "legal or constitutional rights" in an extradition proceeding. 187 U.S. at 184. The Court did not further identify those rights, however. Since there is no constitutional right to confront witnesses in a preliminary hearing to determine probable cause, the refusal to grant that right in an extradition proceeding does not violate the admonition in *Grin* v. *Shine* that persons accused of criminal conduct in other countries must be treated similarly to persons accused of criminal conduct in this country. *Grin* v. *Shine* is therefore entirely consistent with *Bingham* v. *Bradley*, which recognized that in extradition proceedings the government may prove its case by affidavit

and need not present live witnesses who are subject to cross-examination.

4. Petitioner next contends (Pet. 17-21) that the district court was wrong to admit evidence at the extradition hearing simply because it satisfied the requirements of 18 U.S.C. 3190, the statute that governs the admissibility of evidence at an extradition hearing.

Petitioner made a number of unsuccessful objections to the competence of the evidence introduced at his extradition hearing. The court of appeals considered the competence of the evidence under the standards set forth in Section 3190 and the Treaty, and the court found the evidence to be properly authenticated and admissible under each. Pet. App. 17-18. The court of appeals' analysis of this issue was correct.

In considering an extradition request the court or magistrate is bound to admit evidence that complies with the statute and the Treaty. See, *e.g.*, *Collins* v. *Loisel*, 259 U.S. at 313. The weight the court gives to that evidence, however, is not subject to statutory directive. Thus, an affidavit that meets the authentication standards is admissible. If the reliability of the affidavit is otherwise open to question, however, the court may in its discretion give the affidavit little weight. *E.g.*, *In re Assarsson*, 635 F.2d 1237, 1245-1246 (7th Cir. 1980), cert. denied, 451 U.S. 938 (1981); *O'Brien* v. *Rozman*, 554 F.2d 780, 783 (6th Cir. 1977); *Argento* v. *Horn*, 241 F.2d 258, 263 (6th Cir.), cert. denied, 355 U.S. 818 (1957); *Freedman* v. *United States*, 437 F. Supp. 1252, 1265 (N.D. Ga. 1977). The decision of the court of appeals is therefore consistent with well-settled principles, and it does not, as petitioner suggests, deny extradition courts the freedom to weigh the evidence and make an intelligent and independent judgment on the issue of probable cause.

Contrary to petitioner's contention, the decision below does not conflict with *Greci* v. *Birknes*, 527 F.2d 956 (1st Cir. 1976). In that case, the First Circuit considered both 18 U.S.C. 3190 and the particular extradition treaty involved. The fugitive in *Greci* argued that the treaty—between the United States and Italy—imposed a higher standard for authentication than the statute. The court then found that the affidavits presented to the district court in support of the extradition request were unsworn and that there was no indication the affiants were informed of the penalties for making false statements. The court therefore concluded that the affidavits did not satisfy the Italian-American treaty. See *Emami* v. *United States District Court*, 834 F.2d 1444, 1452 (9th Cir. 1987) ("[t]he First Circuit only imposed this requirement because specific language in that particular treaty mandated that result"). Unlike the court in that case, the court of appeals here concluded that the treaty at issue does not impose a higher standard for authentication than Section 3190. See Pet. App. 17. Thus, the differing outcome of the two cases is entirely attributable to the different language in the two treaties.

Equally without merit is petitioner's claim that the decision below conflicts with "the practice traditionally followed by federal courts" (Pet 18). First, the cases he cites, much like *Greci* v. *Birknes*, looked to the statute and the particular treaty involved—just as the court of appeals did in this case. In addition, *Collins* v. *Loisel*, 259 U.S. 309 (1922), on which petitioner relies (Pet. 18), itself recognized that the admissibility of evidence at an extradition hearing is determined by the statute governing authentication. 259 U.S. at 313-314. And *Zanazanian* v. *United States*, 729 F.2d 624, 627-628 (9th Cir. 1984), on which petitioner also relies, considered a hearsay claim as a challenge to the reliability of evidence that was presumably competent under the statute and the applicable

treaty. That analysis is in no way contrary to the approach followed by the same court of appeals in this case.

Petitioner is also wrong in claiming that Section 3190 violates separation of powers principles. The provision for authentication of foreign documents in Section 3190, like the rule permitting self-authentication of domestic public documents (Fed. R. Evid. 902(1)), or the rule providing for the authentication of foreign public documents (Fed. R. Evid. 902(3)), does not unconstitutionally restrict judicial authority. Neither the statute nor Rule 902 takes from the district court the ultimate issues to be determined; both simply declare that evidence is admissible when it is authenticated by a government official. The authentication provision does not also require that the evidence be credited or that it be found sufficient to meet the government's burden of proof at an extradition hearing. Those decisions are entrusted entirely to the judicial officer. Cf. *United States* v. *Southard*, 700 F.2d 1, 22 (1st Cir.), cert. denied, 464 U.S. 823 (1983).

Finally, petitioner's claim that some of the authenticated affidavits were unreliable because they contained hearsay statements or because some of the assertions lacked a foundation is a purely factual challenge that does not merit further review. Hearsay is admissible in extradition proceedings. *Collins* v. *Loisel*, 259 U.S. at 317; *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916); *Emami* v. *United States District Court*, 834 F.2d at 1451; *Shapiro* v. *Ferrandina*, 478 F.2d 894, 902 (2d Cir. 1973). The district court found the affidavits to be reliable, particularly in the absence of any suggestion why the declarants would have reason to lie. Cf. *Zanazanian* v. *United States*, 729 F.2d at 627-628. Petitioner's further complaint (Pet. 20) that the affidavits included "unqualified legal conclusions" of "lay witnesses" is seemingly predicated upon the Federal Rules of Evidence, which do not apply to extradition proceed-

ings. We note also that the "lay witness" who concluded that the loan forms at issue were "misleading and false" (Pet. 20 n.16) was not a "lay witness" in the conventional sense, but was an expert accountant retained by the Government of Hong Kong to examine the bank's records.

5. Petitioner next contends (Pet. 21-23) that the district judge should have recused himself under 28 U.S.C. 455(a) from presiding over petitioner's habeas corpus proceeding, because he had previously presided over petitioner's extradition hearing.

The only other courts of appeals to address the issue have held that recusal is not required under these circumstances. *Demjanjuk* v. *Petrovsky*, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *David* v. *Attorney General of the United States*, 699 F.2d 411, 416 (7th Cir.), cert. denied, 464 U.S. 832 (1983). No court has held that a district judge who presided over an extradition request is disqualified from hearing the ensuing habeas corpus claim. Nor does the relationship between the two proceedings suggest that such a rule should be created.

At the extradition hearing, the issue is whether there is sufficient evidence to sustain the charge under the provisions of the treaty; if there is, the judicial officer presents a certification to that effect to the Department of State. 18 U.S.C. 3184. Since there is no appeal from the judicial finding of extraditability, the fugitive's remedy is to file a petition for a writ of habeas corpus under 28 U.S.C. 2241. In that action, the district court does not revisit the issue presented in the extradition hearing. As this Court explained in *Fernandez* v. *Phillips*, 268 U.S. at 312:

> That writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has already had his hearing and *habeas corpus* is available only to inquire whether the

> magistrate had jurisdiction, whether the offence charged is within the treaty, and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Because habeas corpus review is so limited and is confined to issues other than those previously decided, there is no statutory or constitutional infirmity in the reassignment of the habeas corpus proceeding to the judge who initially heard the extradition case. Contrary to the implication of petitioner's argument, the habeas corpus judge does not either decide the extradition issues anew or sit as an appellate judge to review the extradition judge's actions. Moreover, as the Sixth Circuit has recognized, habeas corpus challenges to criminal convictions are presumptively to be assigned to the judge who presided over the original criminal trial, *Demjanjuk* v. *Petrovsky*, 776 F.2d at 577. And, as the court below pointed out, "[f]ederal district judges are frequently called upon to reconsider prior rulings without recusing themselves." Pet. App. 21. For example, motions for a new trial or for a post-verdict judgment of acquittal in a criminal case are addressed to the judge who presided over the trial, and no claim can be made that the judge is disqualified because he is asked to review the correctness of his own previous orders.

Petitioner relies on the Fourth Circuit's decision in *Rice* v. *McKenzie*, 581 F.2d 1114 (1978), but that decision is not to the contrary. In that case, the court of appeals determined that a state appellate judge who rejected a state defendant's appeal and who then was appointed to be a federal judge should not have considered the same habeas claim on federal review. Because federal habeas corpus review of state criminal judgments is in some respects

like appellate review of a lower court proceeding, the court of appeals held that it was improper for the habeas corpus judge to review a judgment he had approved while sitting as a state court judge.

A rule that a judge ought not to hear the appeal from a case on which he sat below has never been extended to habeas corpus review generally or to the situation presented here, and in fact the Fourth Circuit has declined to expand its application to such situations. See *United States* v. *Parker*, 742 F.2d 127, 129 (4th Cir. 1984). Because this case is like a Section 2255 challenge to a district judge's own prior actions at trial, there is no persuasive reason to conclude that the district judge should have recused himself and refused to hear the habeas corpus claim.

6. Finally, petitioner urges (Pet. 23-26) that the distinction between "explanatory" evidence, which a fugitive may offer at an extradition hearing, and "contradictory" evidence, which he may not present at the hearing, is confusing and should be clarified by this Court. Any difficulty in applying that distinction is not presented here, however, because the evidence that petitioner proffered was clearly inadmissible under well-established principles.

The government's accounting witness found indications of fraud in the payment of loan proceeds to parties other than the borrowers, and in the "complex disbursement patterns" to Indonesian companies, who then paid the money to other accounts. Petitioner proffered the testimony of an expert to dispute that evidence. As this Court long ago stated in *Collins* v. *Loisel*, 259 U.S. at 315-316, the fugitive can explain ambiguities or doubtful elements in the government's prima facie case, but he may not present his defense case at the extradition hearing.

Petitioner's proposed "explanation" for the evidence that suggested fraud to the government's accounting witness plainly amounted to presenting a defense to the charges in the arrest warrant. And that is precisely what the rule in *Collins* v. *Loisel* makes clear the fugitive may not do. The district court therefore properly declined to hear the proffered testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
SARA CRISCITELLI
Attorney

MAY 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699:00273

Supreme Court, U.S.
FILED
JUN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1481

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

OEN YIN-CHOY,
Petitioner,

VS.

GLEN S. ROBINSON,
United States Marshal
for the Northern District of California,
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CEDRIC C. CHAO
Counsel of Record
MICHAEL M. CARLSON
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
(415) 434-7000

Counsel for Petitioner
Oen Yin-choy

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. VIOLATIONS OF THE U.S.-U.K. TREATY	2
A. Extradition to a Third Country	2
B. Prosecution for Additional Offenses	3
II. THE RIGHT TO CHALLENGE TRANSLATED TESTIMONY	4
III. THE RIGHT OF CROSS-EXAMINATION	5
IV. THE EXCLUSION OF INCOMPETENT EVIDENCE	6
V. RECUSAL	8
VI. "EXPLANATORY" v. "CONTRADICTORY" EVIDENCE	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

	Page
Bingham v. Bradley, 241 U.S. 511 (1916)	6
Clifton v. Arnold, 87 So.2d 386 (La. App. 1956)	7
Collins v. Loisel, 259 U.S. 309 (1922)	7, 8
Coy v. Iowa, ___ U.S. ___, 108 S. Ct. 2798 (1988)	5
Frick v. Oklahoma, 509 P.2d 135 (Okla. Crim. App. 1973)	7
Grin v. Shine, 187 U.S. 181 (1902)	6
In re Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978)	7
Reed v. Wiser, 555 F.2d 1079 (2nd Cir.) *cert. denied*, 434 U.S. 922 (1977)	2
Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978)	8
Shapiro v. Ferrandina, 355 F. Supp. 563 (S.D.N.Y.), *modified*, 478 F.2d 894 (2nd Cir.), *cert. dismissed*, 414 U.S. 884 (1973)	8
United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959)	7
United States v. One 1968 Piper Navajo Twin Engine Aircraft, 594 F.2d 1040 (5th Cir. 1979)	7
United States v. Rauscher, 119 U.S. 407 (1886)	3
United States v. Southard, 700 F.2d 1 (1st Cir.), *cert. denied*, 464 U.S. 823 (1983)	7
Van Cauwenberghe v. Biard, ___ U.S. ___, 108 S. Ct. 1945 (1988)	3

Statutes, Rules

18 U.S.C. § 3190	6, 7
Federal R. Crim. P. 5.1(a)	6
Federal Rules of Evidence:	
902(1)	7
902(3)	7

TABLE OF AUTHORITIES

Treaties

Page

Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468, Article XII(1) ..... *passim*

Extradition Convention, May 7, 1908, United States-Portugal, 35 Stat. 2071, T.S. No. 512 4

Treaties on Extradition Between the United States and:

Australia, May 14, 1974, art. XIV, 27 U.S.T. 959, T.I.A.S. No. 8234 2

Canada, Dec. 3, 1971-June 28, 1974, art. 12, 27 U.S.T. 985, T.I.A.S. No. 8237 2

Ireland, July 13, 1983, art. XI, T.I.A.S. No. 10813 2

Italy, Oct. 13, 1983, art. XVI, T.I.A.S. No. 10837 2

Japan, Mar. 3, 1978, art. VII, T.I.A.S. No. 9625 2

Netherlands, June 24, 1980, art. 15, T.I.A.S. No. 10733 2

New Zealand, Jan. 12, 1970, art. XIII, 22 U.S.T. 1, T.I.A.S. No. 7035 3

Sweden, Oct. 24, 1961, art. IX, 14 U.S.T. 1845, T.I.A.S. No. 5496 3

West Germany, June 20, 1978, arts. 22-23, 32 U.S.T. 1487, T.I.A.S. No. 9785 3

Other Authorities

5 D. Louisell & C. Mueller, *Federal Evidence* § 506 (1981) 6, 7

Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 34 (1983) 9

No. 88-1481

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

OEN YIN-CHOY,
Petitioner,

VS.

GLEN S. ROBINSON,
United States Marshal
for the Northern District of California,
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

As this case demonstrates, during the Court's 53-year silence on extradition, conflict and confusion have arisen in the lower courts' handling of such matters. Even the Justice Department described extradition case law as "very outdated" when it supported a proposed legislative revamping of U.S. extradition law. This case presents questions of proper interpretation and application of extradition treaties, of the type of evidence to be received and the evidentiary standards to be applied, and of the procedural protections and legal rights to be afforded the accused. The Court's guidance would greatly assist the federal judiciary and the Bar.

ARGUMENT

I. VIOLATIONS OF THE U.S.-U.K. TREATY

A. Extradition to a Third Country

The Government does not dispute that Hong Kong reverts to Chinese rule on July 1, 1997; that Mr. Oen, if extradited and convicted, could be incarcerated on that date and thereby pass into Chinese custody; that China is a "third state" within the meaning of Article XII(1) of the Treaty; or that the Hong Kong government has refused to provide any assurances that Mr. Oen and other similarly extradited persons will not pass into Chinese custody.

The Government's only response is to draw the meaningless distinction between "extradition" and "surrender" relied upon by the Ninth Circuit. (*See* Brief for the Respondent in Opposition ("Resp. Br.") at 7.) The Government does not respond to Mr. Oen's observation that this distinction renders meaningless the undertakings of Article XII(1) and ignores the Treaty's underlying purpose. *See Reed v. Wiser*, 555 F.2d 1079, 1088 (2nd Cir.), *cert. denied*, 434 U.S. 922 (1977) (treaty should be interpreted to effectuate its evident purpose). The protections of Article XII(1) are particularly important where, as here, the "third state" has a criminal justice system radically different from ours and has no extradition treaty with this country. (App. T at A-85-A-91.) The Ninth Circuit's decision would permit any foreign nation to turn over custody of a person extradited from the United States to any "third state" at any time, so long as the change in custody is effectuated by a "surrender" rather than by "extradition." This result does violence to the numerous United States extradition treaties containing the third-state clause,[1] and warrants review by this Court.

---

[1] *See, e.g.*, Treaties on Extradition Between the United States and: Australia, May 14, 1974, art. XIV, 27 U.S.T. 959, T.I.A.S. No. 8234; Canada, Dec. 3, 1971-June 28, 1974, art. 12, 27 U.S.T. 985, T.I.A.S. No. 8237; Ireland, July 13, 1983, art. XI, T.I.A.S. No. 10813; Italy, Oct. 13, 1983, art. XVI, T.I.A.S. No. 10837; Japan, Mar. 3, 1978, art. VII, T.I.A.S. No. 9625; Netherlands, June 24, 1980, art. 15, T.I.A.S.

B. Prosecution for Additional Offenses

The Government does not deny that Chinese law would permit retrial of Mr. Oen for offenses other than those for which he was extradited; that the Chinese criminal justice system is radically different from ours; or that Hong Kong cannot assure that China will not prosecute Mr. Oen for additional offenses.

The Government merely responds that "[t]he question whether a person in petitioner's position may be prosecuted [for additional offenses] by a State resuming sovereignty (but not a party to the Treaty) is simply not answered by the Treaty." (Resp. Br. at 8.) The Government closes its eyes to the Treaty language and the overriding purpose of the rule of specialty. *See United States v. Rauscher*, 119 U.S. 407, 422 (1886) (in light of the "manifest scope and object of the treaty itself," court rejected government's argument that it could try defendant for non-enumerated crimes in "the absence of express restriction in the [U.S.-U.K. extradition] treaty"). To obtain extradition from the United States, the foreign nation agrees not to subject the extraditee to prosecution or punishment for offenses not listed in the extradition order. The rule of specialty is perhaps also stated as protecting "an extradited person from the exercise of coercive power by the receiving state on matters not anticipated by the extradition." *See Van Cauwenberghe v. Biard*, ____ U.S. ____, 108 S. Ct. 1945, 1951 (1988). A Hong Kong "surrender" of Mr. Oen to China would be precisely the sort of "exercise of coercive power" and "abuse [of] the extradition processes of the extraditing state" that the rule of specialty is designed to prevent. *See id.* This flouting of the Treaty warrants review by this Court.

The recent political upheavals in China heighten the importance of the Treaty issues not only for Mr. Oen, but for every person sought to be extradited to Hong Kong or to Macau.[2] These

---

No. 10733; New Zealand, Jan. 12, 1970, art. XIII, 22 U.S.T. 1, T.I.A.S. No. 7035; Sweden, Oct. 24, 1961, art. IX, 14 U.S.T. 1845, T.I.A.S. No. 5496; West Germany, June 20, 1978, arts. 22-23, 32 U.S.T. 1487, T.I.A.S. No. 9785.

[2] Macau, a Portuguese colony, will revert to Chinese rule in 1999. The United States has an extradition treaty with Portugal which covers

issues will recur whenever there is a change in the nation exercising sovereignty over a territory. This Court also can provide needed guidance to the lower courts regarding the degree to which foreign nations will be required to satisfy their extradition treaty obligations and the manner in which treaty language is to be interpreted.

II. THE RIGHT TO CHALLENGE TRANSLATED TESTIMONY

The Government concedes that signed written witness statements in the Chinese language exist. (Resp. Br. at 9.)[3] The Government does not contest the district court's finding that a "substantial question about the competency of the translator" was raised. (App. G at A-23.) Nor does the Government contest that the prosecutor admitted that Mr. Oen would be able to demonstrate numerous differences between the original Chinese statements and the English affirmations. (CR 12 at 1515.)

The Government advances two flawed arguments. First, based upon a distorted recitation of the factual record,[4] the Government claims that "the English-language affidavits . . . were not originally written in Chinese and then translated into English." (Resp. Br. at 9.) The Government overlooks the affidavit of case agent Yui which stated that:

> All these witnesses had by March 1987 provided statements in the Chinese language. These statements had been translated into the English language by either police interpreters or Chinese language officers. I was earlier instructed by Chief Inspector Ip Lau Chuen that all affirmations of witnesses in the case were to be prepared in the English

---

extradition requests from Macau. Extradition Convention, May 7, 1908, United States-Portugal, art. IV, 35 Stat. 2071, T.S. No. 512.

[3] Because the Ninth Circuit assumed, incorrectly, that there were no original written Chinese statements, it never reached the merits of the translation issue.

[4] Mr. Oen has previously described the translation process (Oen Pet. at 13 n.9) and invites the Court's examination of the record.

> language and were to be based, as necessary, on the English translations of the Chinese statements that the witnesses had previously provided.

(App. U at A-95.) The Government's reasoning—that since the contents of the witnesses' signed Chinese statements were substantially altered during the process of converting them into English affirmations, the accused should be denied access to the Chinese statements—is profoundly dangerous and undermines the integrity of the extradition court's probable cause finding.

The Government next asserts that "the witnesses approved and authorized the affidavits, as orally translated into Chinese, immediately prior to signing them." (Resp. Br. at 10.) The record demonstrates that when the police had written the English language affirmation, a police translator, out of the presence of the court, orally translated the English affirmation into Chinese. (App. U at A-96-A-98; App. V at A-102-A-103.) The Government fails to mention that the witnesses had no way of knowing whether this translation was accurate, and that the Hong Kong police failed to tape record or otherwise memorialize the oral translations. Thus, Mr. Oen's *only* check on the accuracy of the translation process is to compare the original Chinese written statements with the English affirmations. Guidance from this Court is needed on the extent to which the accuracy of translated evidence must be insured.

III. THE RIGHT OF CROSS-EXAMINATION

The Government sidesteps the fact that no case has held that a person facing extradition may not cross-examine a key witness *present in court*. Nor does the Government explain why this fundamental right should be denied when the consideration justifying its denial—not burdening the foreign government with the cost of transporting the witness to the United States—is removed. *Cf. Coy v. Iowa*, ____ U.S. ____, 108 S. Ct. 2798, 2803 (1988) (if any exceptions to the right of confrontation exist, "they would

surely be allowed only when necessary to further an important public policy").[5]

The Government's attempt to analogize an extradition hearing to a preliminary hearing is misguided. An extradition typically involves a complete uprooting of the accused from the country in which he resides and a geographic separation from family and friends; it leads to prosecution and potential incarceration under the laws of a foreign nation. Such consequences do not flow from a preliminary hearing. Equally important, the Government overlooks the fact that defendants *do* have the right to cross-examine witnesses in preliminary hearings. (Fed. R. Crim. P. 5.1(a).) Finally, the Government does not deny that the Justice Department supported proposed legislation that would have provided the right of cross-examination in extradition hearings. (*See* Oen's Pet. at 16 n.12.)

The Government concedes that this Court in *Grin v. Shine*, 187 U.S. 181, 184 (1902), stated that the extradition process must not sacrifice the "legal or constitutional rights of the accused." The Government's observation that *Grin* "did not further identify" those legal or constitutional rights (Resp. Br. at 11) amounts to a concession that the law of extradition needs to be clarified.

IV. THE EXCLUSION OF INCOMPETENT EVIDENCE

18 U.S.C. § 3190 establishes a means of authenticating documents offered by a foreign government. The Government argues that it also establishes a standard for judging the evidence's competency. (Resp. Br. at 12.) This argument confuses the two concepts.

Authenticity requires that a document be what the party offering it purports it to be. 5 D. Louisell & C. Mueller, *Federal*

---

[5] Indeed, in light of the transportation revolution that has occurred during the 73 years since this Court's decision in *Bingham v. Bradley*, 241 U.S. 511 (1916), it is now questionable whether foreign governments are truly "burdened" by transporting their key witnesses to the U.S. This petition thus presents the opportunity to re-examine *Bingham* in light of modern realities.

Evidence § 506 at 16-17 (1981). Competency requires that contents be sufficiently reliable to qualify for consideration by the court. *See Frick v. Oklahoma*, 509 P.2d 135, 136 (Okla. Crim. App. 1973) ("Competent evidence is that which is relevant and material to the issues to be determined"); *Clifton v. Arnold*, 87 So.2d 386, 389 (La. App. 1956). The fact that a document is authentic does not mean that it is admissible; it still must satisfy competency requirements such as foundation and relevancy. *United States v. Southard*, 700 F.2d 1, 22-23 (1st Cir.), *cert. denied*, 464 U.S. 823 (1983); *United States v. One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040, 1042 (5th Cir. 1979); 5 D. Louisell & C. Mueller, *Federal Evidence* § 506 at 22.

The Ninth Circuit's decision eliminates the competency requirement by holding that all evidence that is authentic pursuant to section 3190 is automatically competent. The Government believes this is acceptable because "the court may in its discretion give [unreliable evidence] little weight." (Resp. Br. at 12.) But the Ninth Circuit does not *require* unreliable evidence to be disregarded. Here, the district court granted extradition without any consideration of the evidence's reliability. (App. A at A-17-A-18.) This result conflicts with the holding of *Collins v. Loisel*, 259 U.S. 309, 316 (1922), that the extradition court must determine if "competent evidence" supporting extradition exists.

The Government ignores the fact that federal courts have traditionally *excluded* incompetent evidence, not merely afforded it lesser weight. *See In re Sindona*, 450 F. Supp. 672, 679 (S.D.N.Y. 1978); *United States v. Artukovic*, 170 F. Supp. 383, 391 (S.D. Cal. 1959). The Ninth Circuit's opinion also conflicts with these cases.

The Government argues that the Ninth Circuit's interpretation of section 3190 does not violate separation of powers because it is like Federal Rules of Evidence 902(1) and 902(3). Those rules, however, do not equate authenticity with competency; they preserve the judiciary's power to reject incompetent evidence. *United States v. Southard*, 700 F.2d at 22-23; *United States v. One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d at 1042. The Ninth Circuit's decision allows Congress to rob the judiciary of that

power in violation of the Constitution. Certiorari should be granted to reverse this result.

V. RECUSAL

The Government argues that a district judge may hear a habeas challenge to his prior extradition order because habeas review "is confined to issues other than those previously decided." (Resp. Br. at 15.) The Government misunderstands the role of habeas in extradition. "Since there is no direct appeal from the [extradition] order . . . the Judge from whom [habeas] relief is sought . . . sits as a reviewing court . . . ." *Shapiro v. Ferrandina*, 355 F. Supp. 563, 567 (S.D.N.Y.), *modified*, 478 F.2d 894 (2nd Cir.), *cert. dismissed*, 414 U.S. 884 (1973) (citation omitted).[6]

Clearly, habeas review of an extradition decision is, in the Government's words, "like appellate review of a lower court proceeding." (Resp. Br. at 17.) Motions for a new trial and § 2255 proceedings (Resp. Br. at 16), are not analogous; neither serves as a surrogate for appeal. The reasoning of *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978), which the Government does not challenge, is therefore compelling: a judge should be required to recuse himself from hearing a habeas challenge to his own extradition order. Certiorari should be granted to clarify this issue.

VI. "EXPLANATORY" v. "CONTRADICTORY" EVIDENCE

The Government does not deny that the lower courts have found the *Collins v. Loisel*, 259 U.S. 309, 316-17 (1922), distinction between "contradictory" and "explanatory" evidence confusing and difficult to apply. Instead, the Government asserts that "[a]ny difficulty in applying that distinction is not presented

---

[6] Contrary to the Government's assertion (Resp. Br. at 5), the habeas petition was not randomly assigned to Judge Schnacke. The petition was randomly assigned to the Honorable J. P. Vukasin, Jr., and then transferred to Judge Schnacke under the related case local rule. (CR 28.)

here." (Resp. Br. at 17.) The Government then totally ignores the evidence proffered by Mr. Oen.[7]

Contrary to the Government's suggestion (*id.*), Mr. Oen did not try to "dispute" the Hong Kong government's evidence of "complex disbursement patterns" of the proceeds of the relevant loans. Rather, he offered evidence *explaining* that there were perfectly legitimate reasons for such complexity. (App. S at A-70.) And, he offered other evidence *explaining* that the conclusion of falsity reached by the Hong Kong government's expert was illogical. (*Id.* at A-71.) The Government does not explain why such evidence should be classified as "contradictory." The Government's inability to do so is itself a demonstration of the difficulty of applying *Collins* and of the need for its clarification.[8]

---

[7] The Government erroneously states that Mr. Oen is charged with embezzlement. (Resp. Br. at 3.) Mr. Oen was charged with the crime of false accounting. (CR 7 at 1-5.) When Mr. Oen noted the absence of evidence of the intent element of the Hong Kong crime of false accounting (*see, e.g.*, CR 8 at 378-80), the only assertion of "personal gain" the prosecutor could make was that Mr. Oen allegedly participated in the offenses to save his job as chairman of Union Bank (CR 10 at 1076), although there was no evidence that his job was in jeopardy.

[8] It should be noted that the proposed legislative reform of extradition law (Oen Pet. at 16 n.12) abandoned the contradictory/explanatory dichotomy in favor of the easily-applied standard that "the person sought to be extradited has the right . . . to introduce evidence with respect to the issues before the court." *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 34 (1983), at 10.

CONCLUSION

For the foregoing reasons, Mr. Oen's petition should be granted.

Dated: June 2, 1989

Respectfully submitted,

CEDRIC C. CHAO
Counsel of Record
MICHAEL M. CARLSON
MORRISON & FOERSTER

By CEDRIC C. CHAO
Counsel for Petitioner
Oen Yin-choy